UNITED STATES
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CASES ADJUDGED IN THE
UNITED STATES CUSTOMS COURT

July–December 1979

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HJ6624
A35
v.83

UNITED STATES CUSTOMS COURT

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DECISION OF THE UNITED STATES CUSTOMS COURT

Customs

(C.D. 4812)

TRAVENOL LABORATORIES, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

On Defendant's Motion and Plaintiff's Cross-Motion for Summary Judgment

Court No. 77–8–01757

[Defendant's motion granted; plaintiff's cross-motion denied.]

(Dated July 27, 1979)

Barnes, Richardson & Colburn (*Robert E. Burke, Donald J. Unger,* and *Mark S. Zolno* on the briefs) for the plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, Field Office for Customs Litigation (*Sidney N. Weiss* and *Susan Handler-Menahem* on the briefs), for the defendant.

MALETZ, Judge: This case which comes before the court on cross-motions for summary judgment involves the proper tariff classification of "solution administration sets" that were imported from Ireland and entered at the port of Charleston, S.C., between June and December 1976.

Upon entry, the merchandise was classified by Customs under item 709.27 of the Tariff Schedules of the United States (TSUS), as modified by T.D. 68–9, which covers medical, dental, surgical, and veterinary instruments and apparatus and parts thereof, other, and assessed duty at the rate of 18 percent ad valorem. Plaintiff claims the proper classification is under item 772.65, TSUS, as modified by T.D. 68–9, which covers hose, pipe, and tubing, not specially provided for, of rubber or plastics suitable for conducting gases or liquids, with or

without attached fittings, and carries a duty rate of 4 percent ad valorem.

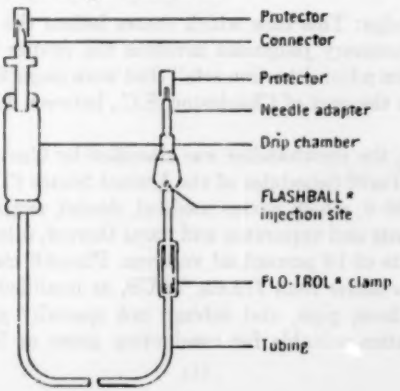
The Statutes

The following are the pertinent provisions of TSUS:

Classified under: Schedule 7, part 2:		
	Subpart B.—Medical and Surgical Instruments and Apparatus; X-Ray Apparatus	
	* * * * * * *	
	Medical, dental, surgical and veterinary instruments and apparatus (including electro-medical apparatus and ophthalmic instruments), and parts thereof:	
	* * * * * * *	
	Other:	
	* * * * * * *	
709.27	Other	18% ad val.
Claimed under: Schedule 7, Part 12:		
	Subpart C.—Specified Rubber and Plastics Products	
	* * * * * * *	
772.65	Hose, pipe, and tubing, all the foregoing not specially provided for, of rubber or plastics, suitable for conducting gases or liquids, with or without attached fittings	4% ad val.

The Facts

The material facts are not in dispute. They show that the imported solution administration sets are composed of various plastic and rubber parts which are fitted together in their imported state. An illustration of a set is depicted below:



The set—which is in chief value of plastic and used to conduct liquids—consists of approximately 70 inches of plastic tubing, a connector, a protector for the connector, a needle adapter, a protector for the needle adapter, a drip chamber, a Flashball injection site, and a Flo-Trol clamp. The interior fluid path of the set is sterile as imported.

On the face of the box in which the set is imported and marketed appears the following:

> Caution: Federal (U.S.A.) law restricts this device to sale by or on order of a physician.

The set is chiefly used in the intravenous administration of blood or other medical solutions to patients and operates in the following manner: The connector is inserted into the outlet of a solution container which is suspended. The drip chamber is half filled, whereupon the Flashball injection site over the needle adapter is grasped and its protector removed. A needle is then attached to the needle adapter and air is removed from the set. The Flo-Trol clamp is then closed and venipuncture performed. After this, the Flashball is squeezed and released and, if the needle is properly inserted into the vein, the blood flows back into the needle adapter. The Flo-Trol clamp is then moved to regulate the flow of the medical solution to the patient.

Opinion

It is undisputed that the sets are medical apparatus within the meaning of item 709.27. However, plaintiff contends that the sets are specifically provided for under item 772.65 as tubing and that under the principle of relative specificity its claimed classification under item 772.65 is more specific than the Government's classification under item 709.27. The court cannot agree with this contention. Rather, for the reasons that follow, it is concluded that item 709.27 covering medical apparatus is more specific than the provision in item 772.65 for tubing, not specially provided for, of plastics suitable for conducting liquids and that the Government's classification under item 709.27 must therefore be upheld.[1]

In considering the relative specificity of the competing provisions in question, it is to be noted that under TSUS general interpretative rule 10(c) an article described in two or more provisions of TSUS is classifiable under the provision which most specifically describes it.

In determining relative specificity, it is settled that in the absence of legislative intent to the contrary—which intent is lacking here—a

[1] In addition to the issue of relative specificity, defendant argues that the imported sets are "more than" plastic tubing with fittings and hence are not covered by item 772.65, as plaintiff contends. However, it is unnecessary to reach this question in view of our disposition of the case on the basis of relative specificity. Thus the court assumes arguendo that the imported sets are not "more than" plastic tubing with fittings and are accordingly covered by item 772.65.

product described by both a use provision and an eo nomine provision is generally more specifically provided for under the use provision. See, e.g., *United States* v. *Snow's United States Sample Express Co.*, 8 Ct. Cust. Appls. 351, T.D. 37611 (1918); *J. J. Boll* v. *United States*, 34 Cust. Ct. 218, 227, C.D. 1707 (1955); *R. W. Smith* v. *United States*, 41 Cust. Ct. 78, C.D. 2024 (1958); *General Chain & Belt Co.* v. *United States*, 42 Cust. Ct. 115, C.D. 2074 (1959); *Novelty Import Co., Inc., et al.* v. *United States*, 55 Cust. Ct. 169, 173–174, C.D. 2570 (1965), *appeal dismissed*, 53 CCPA 155 (1966); Sturm, "A Manual of Customs Law" (1974), page 242 et seq.

Applying this rule of general construction, "[t]here is no doubt * * * that item 709.27 [covering medical apparatus] is a use provision and, as such, classification thereunder is determined by chief use." *University of Oregon* v. *United States*, 65 Cust. Ct. 316, 318, C.D. 4095 (1970). On the other hand, item 772.65—the provision for tubing—is not a use provision but an eo nomine provision of the "basket" type. An eo nomine provision is one which names a specific product or describes a commodity by a specific name. See, e.g., Sturm, *supra*, pages 215–216. The fact that an eo nomine provision may have some limitations does not remove it from the category of an eo nomine provision. See *United States* v. *Charles R. Allen, Inc.*, 37 CCPA 110, 121, C.A.D. 428 (1950). Thus, the requirement that the tubing which is covered by item 772.65 must be suitable for conducting gases or liquids merely limits or restricts the type of tubing which may be classified under that eo nomine provision.

The conclusion thus becomes apparent that under the general rule of construction that a use provision is more specific than an eo nomine provision, item 709.27 covering medical apparatus is more specific than item 772.65 covering tubing.

Moreover, where, as here, one provision (i.e., the tubing provision) is limited by a "not specially provided for" clause and the competing provision (i.e., the provision covering medical apparatus) is not so limited, the nonlimited term is generally favored, absent a contrary legislative intent which is not present here. See, e. g., *United States* v. *Alltransport, Inc.*, 44 CCPA 149, 154, C.A.D. 653 (1957); *Novelty Import Co., Inc.* v. *United States*, *supra*, 55 Cust. Ct. at 174. Put otherwise, "[b]asket clauses and other provisions in tariff statutes are often followed by the words 'not specially provided for,' thus indicating that they are not to prevail where the article is specially provided for elsewhere." Sturm, *supra*, at page 249.

Plaintiff, however, asserts that the provision for medical apparatus covers such a broad category that it does not "specially provide" for the imported merchandise. In this connection, plaintiff relies on *United*

States v. *Ampex Corp.*, 59 CCPA 134, C.A.D. 1054, 460 F. 2d 1086 (1972), where the court held that a provision for insulated electrical conductors with fittings was more specific than a competing provision for television apparatus on the ground that the provision for such conductors more narrowly and specifically described the importations than the provision for television apparatus. *Ampex*, though, is quite distinguishable from the present case. A major difference is that the provision for insulated electrical conductors does not contain a "not specially provided for" clause. By contrast, in the present case the provision for tubing covers only tubing "not specially provided for" thus indicating that the provision for tubing may not prevail since the importation here in issue is "specially provided for" elsewhere as medical apparatus.

It is to be added that there is nothing in *Ampex* suggesting that the provision for television apparatus does not "specially provide for" such apparatus. Indeed, the court in *Ampex* had no occasion even to consider that question. The fact is that the term "specially" as used in a "not specially provided for" clause does not require the extreme narrowness of scope which plaintiff contends in required. See, e.g., *Arthur J. Humphreys* v. *United States*, 56 CCPA 67, C.A.D. 956, 407 F. 2d 417 (1969), where the court held that a provision covering other radio broadcasting apparatus and parts thereof was more specific than a provision covering furniture not specially provided for. Hence, the court in *Humphreys* necessarily concluded that the provision covering other radio broadcasting apparatus and parts "specially provided for" the importations there in issue. By the same token, the provision covering medical apparatus "specially provided for" the importations here in question.

Plaintiff also relies on *Max B. Heim Corp.* v. *United States*, 28 Cust. Ct. 62, C.D. 1389 (1952), where the court held that gelatin spangles were more specifically provided for under the eo nomine provision for spangles not specially provided for, rather than as manufactures wholly or in chief value of gelatin. That case, too, is quite distinguishable from the case at bar. For in *Heim*, the court held that an eo nomine provision containing a "not specially provided for" clause is more specific than a *general* provision for manufactures of gelatin.

In the present case by contrast the competing provisions are not an eo nomine provision and a general provision but an eo nomine provision and a use provision. In that circumstance, the eo nomine provision with the limiting "not specially provided for" clause is less specific and the merchandise is more specifically described in the provision for medical apparatus.

For the foregoing reasons, defendant's motion for summary judgment is granted; plaintiff's cross-motion for summary judgment is denied; and the action is hereby dismissed.

C.D. 4813

GARAY & CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Handbags

Court No. 78–4–00628

Linen handbags containing cloth and yarn in the inner handles, which yarn has been diagonally intertwined, "held" to be properly classified under item 706.20, Tariff Schedules of the United States, as handbags of textile material wholly or in part of braid.

The definition of the term "braids" contained in schedule 3, headnote 2(f) and as further detailed in the "Tariff Classification Study," schedule 3 (1960), evidences the intent of Congress to include those of a "maypole" construction in which three or more lengths are diagonally intertwined.

In view of the definition and the legislative history in which Congress states its belief that said definition properly reflects the trade conception of the term "braids," it supplants the common or trade meaning for customs purposes.

The court is bound by the language used and has no authority to give meaning to the language other than that conveyed by words, terms or expressions in which the legislative will has been expressed. *Armbee Corporation et al.* v. *United States*, 60 Cust. Ct. 105, C.D. 3278, 279 F. Supp. 438 (1968).

The heading of a tariff provision is intended as a convenience and has no legal or interpretive significance. General interpretative rule 10(b).

[Judgment for defendant.]

(Decided July 31, 1979)

Before FORD, *Judge*.

Shaw and Stedina (*Charles P. Deem* on the brief) for the plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Madeline B. Cohen* on the brief), for the defendant.

FORD, Judge: This action is before the court on cross-motions for summary judgment filed pursuant to rule 8.2 of the rules of this court. This merchandise consists of linen handbags, styles SB7559 and SB7560, which were classified under item 706.20, Tariff Schedules of the United States, as modified by T.D. 68–9, as handbags of textile material wholly or in part of braid and assessed with duty at the rate

of 21 per centum ad valorem. The classification is based upon the construction of the inner portion of the handles.

Plaintiff contends the inner portion of the handles is not braid. Accordingly, plaintiff urges the proper classification of the handbags to be under item 706.23, Tariff Schedules of the United States, as modified by T.D. 68–9, as other handbags of vegetable fibers, not pile or tufted, which provides for assessment of duty at 6.5 per centum ad valorem.

The pertinent statutory provisions provide as follows:

	Luggage and handbags, whether or not fitted with bottle, dining, drinking, manicure, sewing, traveling, or similar sets; and flat goods:	
	* * * * * * *	
	Of textile materials (except yarns, of paper), whether or not ornamented:	
706.20	Wholly or in part of braid-----	21% ad val.
	* * * * * * * *	
	Other:	
	Of vegetable fibers and not of pile or tufted construction:	
	* * * * * * * *	
706.23	Other-----------	6.5% ad val.

Schedule 3 headnotes:

* * * * * * *

2. For the purposes of the tariff schedules—

* * * * * * *

(f) the term "braids," as used in connection with textile materials or textile articles, includes all braids in the piece, whether of flat, tubular, or other construction, with or without cores, and whether braided from fibers, filaments (including tinsel wire and lame), yarns, cordage, textile fabrics, or any combination thereof;

* * * * * * *

The statements of the parties filed pursuant to rule 8.2(b) of the rules of this court attest to the fact that there is no genuine issue of fact to be tried. The parties agree in effect that the handles consist of textile fabric and yarn. The several pieces of yarn are diagonally intertwined and perform the useful function of holding the cloth pieces, which are located inside the handles, in a round form during and after the sewing of the outer material of the handles.

This matter is submitted on statements of facts under rule 8.2(b), supra, together with two samples which have had the handles cut in

order to explore the inner construction. In addition, defendant has supplied two affidavits, one from Arthur Price, a professor of textile science and chairman of the department at the Fashion Institute of Technology which is a unit of the State University of New York. The second affidavit was that of Karen P. Binder, an attorney with the Office of the Assistant Chief Counsel for Customs Court Litigation, U.S. Customs Service, in which she deposes that she presented the samples of the imported merchandise to Mr. Price.

The question of law presented for determination is whether the diagonally intertwined yarn contained in the inner handles of the handbags constitutes braid. The affidavit of Professor Price, who examined the samples, states as follows:

> Based upon my experience, it is my opinion that the inner portion of the handle of this handbag is composed of textile fabric which is wrapped by three or more lengths of yarn which are diagonally intertwined in a so-called "maypole" construction.

The definition of the term "braids," as set forth, supra, in headnote 2(f) of schedule 3, makes it evident that said term was intended to encompass braids "in the piece," "whether of flat, tubular, or other construction," "with or without cores" and whether made "from fibers, filaments (including tinsel wire and lamé), yarns, cordage, textile fabrics, or any combination thereof."

The legislative intent with respect to headnote 2(f) is set forth in the "Tariff Classification Study," schedule 3 (1960), as follows:

> The term "braids" which is defined in headnote 2(f) is a term which has acquired a variety of meanings. It has been loosely used to include ornamental trimmings of practically every construction. Properly, however, and as used in these schedules, braid is formed by a special "maypole" type of construction, in which three or more lengths are diagonally intertwined. It is so interpreted in customs practice, with the exception of a limitation which has been imposed by practice, affirmed by court ruling (CD 825; CIE 1661/57). Under these rulings, it is the practice of customs officers to exclude from the meaning of the term "braids" so-called cords which consist of a braided sheath surrounding an inner core. This latter practice is not reflected in the proposed definition which would include all braids in the piece whether flat, tubular, or of other construction, and whether with or without cores. The proposed definition also includes such braids whether they have been braided from fibers, filaments (including tinsel wire and lame), yarns, cordage, textile fabrics, or any combination thereof. It is believed that this definition properly reflects the trade conception of braid.
>
> * * * * * * *
>
> The provision for braids covers those which are not suitable for making or ornamenting headwear. The headwear braids are dutiable in part 1B of schedule 7. As previously stated in the

explanatory notes regarding the definition of the term "braids" (schedule 3, headnote 2(e)), this term includes true braids whether or not they contain cores. In item 348.00 tubular braids with a nonelastic core are separately provided for in order that the existing customs practice of imposing lower rates of duty thereon may be continued. In the interest of clarification and simplicity, the five different rates which are set forth in the existing provisions of paragraphs 912, 1015, 1113, 1207, and 1308 have been compromised into an estimated average rate of 30 percent ad valorem. Item 348.05 involves no rate change.

Congress, in enacting the provisions for braids, was well aware of the variety of meanings which the term has acquired. In order to prevent misunderstanding, Congress set forth the type of construction of braids it intended to cover. The construction was for three or more lengths to be diagonally intertwined which is known as a "maypole" type of construction. Plaintiff admits the construction is the result of two to four pieces of cloth wrapped with several pieces of yarn diagonally intertwined. Mr. Price, after examination of the exhibits, confirmed this and further designated such construction as the maypole type.

While classification is under schedule 7, the information contained ir headnote 2(f) of schedule 3 and in the "Tariff Classification Study" is pertinent to the determination. This headnote controls when textile materials are involved. It is agreed the imported merchandise is composed of textile material.

In view of the definition and the legislative history in which Congress states its belief that said definition properly reflects the trade conception of the term "braids," it supplants the common or trade meaning for customs purposes. The court is bound by the language used and has no authority to give meaning to the language other than that conveyed by words, terms or expressions in which the legislative will has been expressed. *Armbee Corporation et al.* v. *United States*, 60 Cust. Ct. 105, C.D. 3278, 279 F. Supp. 438 (1968), *appeal dismissed*, 55 CCPA 115 (1968).

The case of *Sol Kahaner & Bro.* v. *United States*, 71 Cust. Ct. 97, C.D. 4480, 372 F. Supp. 1393 (1973), *aff'd*, 62 CCPA 35, C.A.D. 1141, 509 F. 2d 1186 (1975), cited by both parties is supportive of defendant's position. In the *Kahaner* case, certain merchandise known in the millinery trade as braid was held not to be braid since it was made on a knitting machine and did not have the necessary maypole construction.

Plaintiff's position that braids suitable for making or ornamenting headwear (item 703.80–703.95) and tubular braids with nonelastic core under item 348.00 do not encompass the involved merchandise is correct. The "Tariff Classification Study" (1960) cited supports

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this position. The argument, however, is without merit since plaintiff has apparently overlooked item 348.05, TSUS, which provides for other "Braids not suitable for making or ornamenting headwear." This provision would cover braid of the type utilized in the handles of the handbags involved herein.

The fact that the braid is functional does not affect the classification. "Summaries of Trade and Tariff Information," schedule 3, volume 6 (1968), states:

> * * * Braids often are functional components of wearing apparel, household furnishings, furniture upholstery, luggage linings, safety equipment, parachutes, rugs, hoses, electric cords, military insignia, and many other items.

The heading of schedule 3, part 4, "Fabrics of Special Construction or for Special Purposes" which covers braids not suitable for making or ornamenting headwear is not determinative. The heading of the tariff provision utilizing such language is intended as a convenience and has no legal or interpretive significance as set forth in general interpretative rule 10(b).

In view of the foregoing, the imported handbags were properly classified under item 706.20, supra. Defendant's cross-motion for summary judgment is granted and plaintiff's motion for summary judgment is denied.

Judgment will be entered accordingly.

(C.D. 4814)

SEAGULL MARINE, PLAINTIFF *v.* UNITED STATES, DEFENDANT

On Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment

Court No. 78-9-01574

[Motion granted; cross-motion denied.]

(Decided August 1, 1979)

Before RICHARDSON, *Judge*.

Glad, Tuttle & White (*Edward N. Glad* on the briefs) for the plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Susan C. Cassell* on the brief), for the defendant.

RICHARDSON, Judge: The merchandise in this action consists of inflatable liferafts exported from England and entered at Los Angeles-

Long Beach, Calif., in March 1977. The liferafts were classified in liquidation under TSUS item 696.05 as modified as yachts or pleasure boats, valued not over $15,000 each, at the duty rate of 2 per centum ad valorem. The importer contends that the liferafts are exempt from duty as "vessels" in accordance with general headnote 5(e) of the TSUS. And the Government, while conceding the classification to be erroneous, contends that the liferafts should be classified under TSUS item 696.35 as modified as pneumatic craft not specially provided for, not of a type designed to be chiefly used with motors or sails, at the duty rate of 6 per centum ad valorem.

The case is before the court on motion and cross-motion for summary judgment, and the essential facts in the case are not in dispute. It appears that the subject liferafts have a carrying capacity of from 4 to 16 persons; are made of a rubber-covered fabric, with sides consisting of 2 inflatable tubes with inflatable arches and opening at one end; are inflated by means of a carbon dioxide cylinder and valves which are parts of the equipment of each raft and which can be activated either automatically or manually; are equipped with gear such as painters, sea anchors, paddles, rainwater catchments, an emergency pack containing first aid equipment, water, seasickness tablets, and flashlights; and are imported in deflated condition packed either in a low-profile canister or a valise. Additionally, the parties concede that the merchandise in issue is in all material respects the same as that in *Thornley & Pitt, C.J. Hendry Co.* v. *United States*, 48 Cust. Ct. 134, C.D. 2325 (1962) which plaintiff argues is stare decisis of the issue here.

In *Thornley & Pitt, C. J. Hendry Co.* v. *United States, supra*, the liferafts, composed in chief value of india rubber and imported as cargo, had been classified in liquidation under paragraph 1537(b) of the Tariff Act of 1930, as modified by T.D. 53865 and T.D. 53877, as manufactures of india rubber, at the duty rate of 12½ per centum ad valorem, and the importer primarily claimed that the liferafts are "vessels" within the rule expressed by the Supreme Court in *The Conqueror*, 166 U.S. 110 (1897), and not subject to tariff duties. The First Division of the Customs Court, speaking through Mollison, J., sustained the importer's primary claim. The court said (p. 137):

> * * * we are of the opinion that the liferafts before us are "vessels" within the definition of that term, as codified in 1 U.S.C., section 3, and as that term has been judicially defined in the cited cases. They are contrivances used, or capable of being used, as a means of transportation on water; the service upon which they are capable of being engaged is a maritime service, and their use is practical. They are not within the class of vessels which Congress has made subject to duty, i.e., motorboats, yachts, or pleasure craft, and, while possibly not of the general

shape and outline of what is ordinarily called to mind by the use of the word "vessel," nevertheless, they meet every requirement of statutory definition and of the judicial construction of the laws involved.

The Government contends that the doctrine of stare decisis is not applicable here because *Thornley & Pitt* is clearly erroneous, and has in essence been overruled by our appellate court. Defendant argues that the liferafts in issue are not "vessels" because they are not used for transportation, being at best designed to permit the occupants to "float" or "drift" until rescued, which activity defendant does not deem to constitute transportation. Defendant further argues that the liferafts are not "vessels" because they are not involved in any commercial or maritime service, citing *United States* v. *Bethlehem Steel Co. et al.*, 53 CCPA 142, C.A.D. 891 (1966), and touting the "relative unseaworthiness" of the rafts as compared to the midbodies involved in *Bethlehem Steel*. And finally, defendant argues that the competing tariff provisions which confronted the *Thornley & Pitt* court are different from the competing tariff provisions which confront this court today in this case, noting that "specificity has replaced generality," with the result that *Thornley & Pitt* is rendered inapplicable thereby.

Plaintiff counters with the argument that *Bethlehem Steel* did not overrule *Thornley & Pitt* by excluding liferafts from the definition of the term "vessel," and with the further argument that defendant's remaining arguments have all been answered in *Thornley & Pitt* which has not been shown by defendant to be erroneous.

The court agrees with plaintiff. The court does not find defendant's arguments to be persuasive of the existence of error in the well reasoned opinion of Judge Mollison in *Thornley & Pitt* who, among other things, discussed all of the principal cases touching upon the subject of vessels dating back to *The Conqueror*, *supra*, as well as the statutory definition of the term "vessel" as set forth in 1 U.S.C., section 3, before concluding that the liferafts met every requirement of statutory definition and of judicial construction of the laws involved.

The fact that the liferafts in issue merely float and do not conform in shape to the conventional shape of boats as an aid to propulsion is of no moment. Even prior to *The Conqueror*, *supra*, the courts recognized that rafts were "vessels" although possessing no means of propulsion except that imparted by action of currents or waves. See *United States* v. *One Raft of Timber*, 13 F. 796 (1882); *Seabrook* v. *Raft of Railroad Cross-Ties*, 40 F. 596 (1889). In *Seabrook* the court said (p. 598), "The first vessels were rafts. The raft is the parent of the modern ship." Moreover, the status of the raft as a "vessel" is recognized in the Tariff Schedules where, under item 696.60, only rafts (among other things) which are not "vessels" are made dutiable under

the *eo nomine* provision for rafts.[1] And it is to be noted that these vehicles of burden were not among the classes of watercraft referred to in dicta in *The Conqueror, supra*, at pages 117–118, i.e., pleasure boats, as indicative of boats responding to tariff descriptions of "manufactures" or "other articles."

The decision of our appellate court in *United States* v. *Bethlehem Steel Co. et al., supra*, does not overrule the decision of this court in *Thornley & Pitt*. *Bethlehem Steel* went no further than to hold that watercraft designed and intended for uses other than as a means of transportation on water do not come within the meaning of the term "vessel," the court there concluding that a part of a vessel (midsection) is not a "vessel." However, in *Thornley & Pitt*, as in the case at bar, the liferafts, although considered a species of inferior craft, were unquestionably designed and intended for use solely as a means of transportation on water, albeit for temporary, emergency use. And since size and structure per se are not determinants of the status of a structure as a "vessel" under statutory definitions of the term (see *United States* v. *Bethlehem Steel Co. et al., supra*, at p. 152), the service performed by these liferafts, whether or not actually used on a voyage, must be regarded as a useful and valuable "maritime" service. By contrast, the service performed by the midsection in *Bethlehem Steel* was not a "maritime" service, but merely the fulfillment of a "construction" service.

The attempted differentiation between the competing tariff provisions before the *Thornley & Pitt* court and before this court vis-a-vis the instant case is more illusory than real. The provision in item 696.35 for pneumatic craft is residual, being qualified, among other things, by the limitation "not specially provided for" which appears in the superior heading preceding the item. And the provision merely reflects a redistribution under the TSUS of articles theretofore classified under paragraph 1537(b) of the 1930 Tariff Act from which item 696.35 was derived in part without rate change. See "Tariff Classification Study" (1960), "Submitting Report," page 21, "Proposed Provisions," page 519, and "Schedule 6, part 6," page 327. Consequently, item 696.35 was not intended to represent a change in classification practice from the 1930 act; and can in no wise be said to be a legislative assault upon the efficacy or impact of *Thornley & Pitt* in excluding pneumatic liferafts from classification under paragraph 1537(b).

Thus, unless shown to be erroneous, *Thornley & Pitt* continues to be viable precedent under the TSUS for the holding that liferafts

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[1] The articles most readily called to mind as falling within this dutiable category would be the stationary raft one frequently sees at a bathing beach anchored offshore in deep water, and not utilized for the transportation of people or things.

of the pneumatic variety are specially provided for under the provision for "vessels" in general headnote 5(e). Since no such error has been shown, for the reasons stated, the holding in *Thornley & Pitt, C. J. Hendry Co.* v. *United States, supra*, is stare decisis of the issue here, and the court so holds. See *United States* v. *L. Batlin & Son, Inc.*, 61 CCPA 17, 19, C.A.D. 1111, 487 F. 2d 916 (1973).

Plaintiff's motion for summary judgment is granted, and defendant's cross-motion for the same relief is denied. Judgment will be entered accordingly.

(C.D. 4815)

SIMMON OMEGA, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Phototypesetters

Court No. 71-12-02126

PHOTOTYPESETTING MACHINES—MORE THAN ENLARGERS

Phototypesetting machines capable of photographic enlargement as an incident to their typesetting function, but not used for photographic enlargement per se, are classifiable as typesetting machines under item 668.25, TSUS, as claimed by the importer, rather than as photographic enlargers under item 722.18, TSUS, as classified by the Government. The imports are specially designed to utilize a patented photocomposing process, the essence of which is to permit the optical control of letter positioning during the photographic setting. The machines' type selection and positioning features, which utilize the patented photocomposing process, make the imports more than simply "enlargers," as that term is commonly defined, and consequently they are beyond the intended scope of item 722.18, TSUS. *Cf. E. Green & Son (New York), Inc.* v. *United States*, 59 CCPA 31, C.A.D. 1032, 450 F. 2d 1396 (1971); *United States* v. *Milton Diamond et al.*, 42 CCPA 9, C.A.D. 561 (1954).

COMMON MEANING

In the absence of a special commercial designation, the language of a tariff statute is to be construed in accordance with its common meaning. Further, the common meaning of a tariff term is a matter of law to be determined by the court; and in making such determination, the court may rely upon its own understanding of the word or term used and may consult standard lexicographic and scientific authorities. The testimony of witnesses respecting common meaning is advisory only and has no binding effect on the court. *United States* v. *National Carloading Corp. et al.*, 48 CCPA 70, C.A.D. 767 (1961); *United States* v. *E. Besler & Company et al.*, 64 CCPA 121, 124, C.A.D. 1193, 557 F. 2d 270 (1977); *United States* v. *Corning Glass Works*, 66 CCPA 25, C.A.D. 1216, 586 F. 2d 822 (1978).

LEGISLATIVE HISTORY—EXPLANATORY NOTES

The "Explanatory Notes to the Brussels Nomenclature" may properly be referred to as an aid to interpreting the provisions of the TSUS where there is a "close similarity in the wording" of the two provisions. *United States* v. *Abbey Rents*, 66 CCPA 2, n.5, C.A.D. 1213, 585 F. 2d 501 (1978). On the basis of similarity of wording, the court finds no nexus between TSUS items 668.25 and 722.18 and Brussels headings 84.34 and 90.09.

SAME—AMBIGUITY

Since the TSUS provisions for typesetting machines and enlargers in items 668.25 and 722.18 are clear and unambiguous, resort to legislative history is unnecessary and would be erroneous. *United States* v. *Corning Glass Works*, 66 CCPA 25, C.A.D. 1216, 586 F. 2d 822 (1978); *C. J. Tower & Sons* v. *United States*, 41 CCPA 195, C.A.D. 550 (1954); *Continental Manufacturing Co. et al.* v. *United States*, 82 Cust. Ct. 187, C.D. 4800 (1979).

BURDEN OF PROOF

In a classification case, the importer has a dual burden of proof: First, it must be shown that the Government's classification is erroneous; second, the importer must establish the correctness of its claimed classification. *Daisy-Heddon, Div. Victor Comptometer Corp.* v. *United States*, 66 CCPA 97, C.A.D. 1228, 600 F. 2d 799 (1979).

TYPESETTING MACHINES—KEYBOARD OPERATION

Keyboard operation is not a sine qua non of a typesetting machine classifiable under item 668.25, TSUS. Technological advancements in the typesetting art will be judicially recognized in determining whether a particular device is classifiable as a typesetting machine, and such classification is not restricted to machines that operate in a particular mode. *Lanston Industries, Inc.* v. *United States*, 49 CCPA 123, C.A.D. 807 (1962); *United States* v. *Consolidated International Equipment & Supply Co.*, 58 CCPA 145, C.A.D. 1018, 442 F. 2d 376 (1971).

EO NOMINE PROVISION FOR TYPESETTING MACHINES INCLUDES SPECIAL PURPOSE PHOTOTYPESETTERS

The fact that the imports are special-purpose display phototypesetters without a keyboard and are suitable only for typesetting jobs involving a small amount of text, such as for a headline or advertisement, in contrast to the high-speed keyboard machines used for voluminous standardized text for newspapers or books, does not preclude classification of the imports under the eo nomine provision for typesetting machines, in accordance with their design and function. *Cf. United States* v. *E. Besler & Company et al.*, 64 CCPA 121, C.A.D. 1193, 557 F. 2d 270 (1977).

EO NOMINE DESIGNATION

An eo nomine designation without limitation includes all forms of the article. *United States* v. *National Carloading Corp. et al.*, 48 CCPA 70, C.A.D. 767 (1961).

SUMMARIES OF TRADE AND TARIFF INFORMATION

The "Summaries of Trade and Tariff Information" are used as an aid in determining the scope of tariff provisions. Cases cited.

STATUTORY CONSTRUCTION—TARIFF ACTS WRITTEN FOR FUTURE

Even assuming that at the time the TSUS became effective, phototypesetters were operated by means of a keyboard, it is inconceivable that Congress would have intended to foreclose from classification under item 668.25, TSUS, future innovations in typesetting, since tariff acts are written for the future. *Lanston, supra*, 49 CCPA at 128.

[Judgment for plaintiff.]

(Decided August 7, 1979)

Serko & Simon, Esqs. (*Joel K. Simon, Carl R. Soller* and *Margaret H. Sachter*, Esqs., of counsel) for the plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation, *Edmund F. Schmidt* and *Jerry P. Wiskin*, trial attorneys, Esqs., for the defendant.

NEWMAN, Judge: Plaintiff challenges the classification by customs of certain phototypesetting machines imported from West Germany in 1969, 1970, and 1971. The machines were classified as "Other [photographic] enlargers" and assessed with duty at the rate of 10 or 9 per centum ad valorem, depending upon the date of entry, under item 722.18, TSUS, as modified by T.D. 68–9.[1] Plaintiff claims that the imports are entitled to entry free of duty under the provision in item 668.25, TSUS, for typesetting machines.

I have concluded that plaintiff's claim should be sustained.

Statutes Involved

Tariff Schedules of the United States, 19 U.S.C. 1202:

Classified under [schedule 7, part 2, subpart F]:		
	Photographic cameras (other than motion-picture cameras), photographic enlargers, and combination camera-enlargers:	
	* * * * * * *	
722.18	Other enlargers and camera-enlargers	[9%, 10% ad val. depending on date of entry]
Claimed under [schedule 6, part 4, subpart D]:		
	Part 4 headnotes:	
	1. This part does not cover—	
	* * * * * * *	

[1] In one of the eight entries covered by this civil action, No. K-23000, customs classified the merchandise under the provision for cameras in item 722.16, TSUS.

(v) articles and parts of articles specifically provided for elsewhere in the schedules.

* * * * * * *

668.25 Linotype and typesetting machines, and parts thereof ..... Free

The Record

The record in this case comprises the testimony of two witnesses on behalf of plaintiff and one witness on behalf of defendant. Plaintiff's witnesses were Lawrence D. Klein, training manager for Berthold of North America, a subsidiary of H. Berthold, A.G. of Germany, manufacturer of the imported machines, and Kenneth Harlan Owen, products specialist for Berkey Marketing Cos. Defendant called Joseph D. Fielder, an instructor in graphic arts and related subjects at New York City Community College.

Each party submitted various exhibits.

The pertinent facts are:

In controversy are two machines sold under the names of "Staromat" and "Starsettograph." The Staromat and its less automatic counterpart, the Starsettograph, are phototypesetters designed to generate headline or display type, viz, type of one fourth inch in size or larger. Each machine has an upright bar affixed to the rear of a platform to which is attached a platen. The platen is in the shape of a shallow tray and is designed to hold sensitized paper or film bathed in developer fluid.[2] The platen can be swiveled, and can be moved from side to side and from front to back on geared rollers, according to markings calibrated in millimeters for precise settings.

Clamped to the upright bar is the head of the machine, containing a projection lamp, the light from which passes through a series of condenser lenses and mirrors to sharpen it, and then through a shutter mechanism containing a red filter. Below this point, the head of the machine contains a specially designed carrier with a slot on either side into which may be inserted a "font" 2 inches wide and 30 inches long,[3] consisting of a strip of acetate encased in clear plastic. The font contains upper- and lower-case alphabets, punctuation, numerals, and symbols. Below each letter on the font is a "foundry bar" (a bracket turned on its side) that aids the operator in proper spacing of the type.

In addition to using the foundry bars, proper spacing of the type characters is achieved by means of a millimetric ruler that is on the front of the machine, or by use of his eye the operator can place a letter any distance from the preceding letter. The font carrier has guides,

[2] In a photographic enlarger, the photosensitive paper or film is held by an easel.

[3] Owen testified that he had never seen photographic negatives or slides of this size used in a photographic enlarger.

pressure fingers, and rollers designed to hold the long strip font firmly under tension, and to allow the operator to move the font from side to side through the carrier by means of a crank to select the desired letters on the font. A lever automatically shifts the carrier forward or backward for setting upper- or lower-case letters. The carrier will accept only the fonts specifically made for it by the manufacturer of the machines, and thus will not accept photographic negatives or slides in the ordinary range of sizes. In this connection, plaintiff's witness Owen knew of no carriers in photographic enlargers that would accept the type font used with the instant machines and move it with precision from one letter to another (R.123).

Type is set or composed with the Staromat and Starsettograph in the following manner: The operator inserts the type font into the special carrier in the head of the machine. He then places a sheet of photosensitive paper or film on the platen, moistens it with an activating fluid, turns on the lamp (which remains on until the entire job is completed),[4] and shifts the font to select the first letter. An image of the first letter is projected through the red filter and appears on the sensitized typesetting paper or film, which is not sensitive to red light. Guided by this trial image, the operator raises or lowers the head to control the size of the letter being projected, and moves the platen by a lever to position the type image on the photosensitive paper in accordance with his design. For example, the platen is moved forward or backward to set one line of type over another in a headline comprised of two lines. Platen movement is calibrated in 1-millimeter increments, "so that positions can be gotten back to again, if you have to reproduce the job" (R. 51).

The letters on the font (exhibit 4) are five-sixteenths inch, and can be used without enlargement or reduction. To set larger or smaller type, the head of the machines must be raised or lowered. Thus, through enlargement or reduction of the characters on a single font, there is an infinite choice of type sizes available ranging from approximately 1/32 to 5½ inches.

So that the composed type will reproduce well in the various stages of printing, the machines adjust focus and exposure in relation to the size of the type being set, to obtain the sharpest and blackest image possible. The Staromat performs this function automatically by means of an electronic control box that is part of the machine as imported. The Starsettograph also performs this function, but not automatically.

When the type is correctly positioned and the operator triggers an exposure, the red filter automatically swings out of the way so that

[4] Unlike a photographic enlarger in which the light is turned off after each exposure, the light source for the instant machines remains on constantly once the machines are turned on, which is necessary for the proper positioning of the letters in setting type.

light projects through the font onto the photosensitive paper or film.[5] The light goes through only the letter or symbol on the font that is brought into position, which would be an area approximating three-eighths by one-half inch.

The imported machines are designed to utilize a patented photocomposing process (exhibit B), the essence of which is to permit the optical control of letter positioning during the photographic setting—"that is, the operator can visually watch the formation of a word through single letters, as in writing, and can regulate the positioning of the various letters" (exhibit B, col. 1, lines 16–18). The image of a letter begins to develop immediately on the phototypesetting paper or film because of the special activator fluid in the platen. By the time the operator has selected the next letter, the image of the first has blackened sufficiently so that it acts as a guide to position a red or safe trial image of the second type character on the paper in the desired relation to the first by shifting the platen. In order to correctly position the second letter, the operator must see where the first letter is located. The foregoing operation is repeated letter by letter and line by line on the same sheet of photosensitive paper, which remains in full view throughout. Hence, the operator of the machines is able to see the entire typesetting job as it progresses, which aids the composition and positioning of the type on the sheets of paper or film.

The paper or film on which type has been set is placed into a fixing bath to terminate its sensitivity. The life of the exposed paper is about 6 months to 1 year, as contrasted to paper used for black and white photographic enlargements, which will last about 50 years. A short life for the exposed phototypesetting paper is adequate since the product is usually pasted into a total composition with other materials, the whole page is then photographed, and the negative is used to make a printing plate.

Staromat and Starsettograph machines are designed for composing type used in headlines, advertisements, various printed forms, and catalogs. Plaintiff's witness Klein testified that from his knowledge of the list of buyers of the machines, none of the machines were sold to photographic enlargement houses (R. 71). Defendant's witness Fielder identified as typesetters several phototypesetting machines that operate similarly to a photographic enlarger or have enlargement capabilities (R. 159–62). Additionally, Fielder testified that the

[5] The red filter is connected to a solenoid spring, so that when exposure is triggered, the solenoid pulls the filter out of the path of the light, and when exposure is completed, the filter returns to position automatically covering the hole through which the light is transmitted. Owen had never seen an enlarger incorporating a red filter that automatically swings in and out of place (R. 120). However, he had seen red filters that had been attached to enlargers which could be moved manually that were at one time used in the place of a timer, but "they are somewhat vistigial organs of the past" (R. 120-21, 132).

Staromat "operates on the same principle as a photographic enlarger" (R. 148).

As shown on pages 4 and 5 of plaintiff's brochure (defendant's exhibit A), the imported machines can produce a wide range of typographic styles and special effects. Thus, typefaces can be set in condensed, extended, italicized, and backslanted styles. Typefaces can also be screened, reversed, shaded, drop-shadowed, or combined with tone. In addition to setting type in a straight line, type may be composed in a variety of circular, spiral, bounced, staggered, jumbled, step, and repeat or tight settings, and letters may be intentionally blurred, smeared, or distorted to create special effects.

Summary of Parties' Contentions

Defendant contends that its classification of the imported machines under item 722.18, TSUS, is supported by the common meaning of the term "enlarger," and by legislative history. Moreover, defendant maintains that since the imports are specifically provided for as enlargers under item 722.18, these imports must in any event be excluded from classification as typesetting machines under item 668.25 by virtue of headnote 1(v), schedule 6, part 4, which excludes from part 4 articles specifically provided for elsewhere in the schedules.

Plaintiff argues that the imported machines have features that dedicate them for use in typesetting which are not embraced by the meaning of the term "enlarger" as used in item 722.18, but are encompassed by the provision for "typesetting machines" in item 668.25. Further, plaintiff contends that legislative history supports the classification of the imports as typesetting machines.

Opinion

I

Resolution of the issue requires a determination of the meaning of the eo nomine provision for "enlargers" as this term is used in item 722.18, TSUS. Fundamentally, in the absence of a special commercial designation, the language of a tariff statute is to be construed in accordance with its common meaning. Further, the common meaning of the word "enlarger" is a matter of law to be determined by the court; and in making such determination, the court may rely upon its own understanding of the word or term used and may consult standard lexicographic and scientific authorities. The testimony of witnesses respecting common meaning is advisory only and has no binding effect on the court. *United States* v. *National Carloading Corp. et al.*, 48 CCPA 70, C.A.D. 767 (1961); *United States* v. *E. Besler & Company et al.*, 64 CCPA 121, 124, C.A.D. 1193, 557 F. 2d 270 (1977); *United States* v. *Corning Glass Works*, 66 CCPA 25, C.A.D. 1216, 586 F. 2d 822 (1978).

In support of its position that the imported machines fall within the common meaning of the term "enlarger," defendant cites:

> LaCour and Lathrop, "Photo Technology" (1966), at page 113:
> *Enlargers*
> Basically all enlargers consist of a light source, a means of distributing the light evenly, a negative carrier, a lens, a focusing device, a means of changing the distance of the lens to a negative and an easel for holding the paper.
>
> and
>
> Webster's Third New International Dictionary (1963), at page 754:
> One that enlarges, *specif.*: an optical projector used to produce a photographic enlargement.

Defendant maintains that the manner in which the imported devices operate coincides with the common meaning of the term "enlarger." Plaintiff, on the other hand, while conceding that the imported machines can enlarge (or reduce) the size of the font characters in the process of phototypesetting, vigorously argues that enlargement is only one aspect of the patented photocomposing process for which the machines were designed, and that the imports have additional features enabling the operator to select and compose type used in printing, which features distinguish the imports from photographic enlargers. In short, plaintiff contends that in the photocomposing of type the instant machines do not function simply as enlargers, but rather as typesetters. I agree.

The record amply supports the conclusion that the phototypesetting function performed by the Staromat and Starsettograph is more than photographic enlargement. The Government's classification of the machines as enlargers is thus predicated upon a single phase of the machines' typesetting function. In addition to their enlargement capability, the imports incorporate features for type selection and positioning that are not encompassed by the common meaning of the term "enlarger." Simply put, I find that the machines in issue are designed for photocomposing of type, and in performing that function they do more than simply enlarge.

As indicated supra, the photocomposing process performed by the machines in issue is covered by a patent (No. 3,196,016), introduced in evidence by defendant (exhibit B). That the essence of the patented process is not photographic enlargement, but rather the facilitation of letter positioning, is made abundantly clear from the following portion of the patent specification (exhibit B, col. 1, lines 14–18):[6]

> * * * A *special advantage of the invention* (photocomposing process) is the optical control during the photographic setting—

[6] If the photocomposing process set forth in patent No. 3,196,016 (1965) was simply photographic enlargement, it is obvious that the patent would not have been issued in the light of the prior art in the photography field.

> that is, the operator can visually watch the formation of a word through single letters, as in writing, and can *regulate the positioning of the various letters.* [Italic added.]

The patented photocomposing process utilized by the machines is further described in the portion of the descriptive pamphlet covering the Staromat introduced in evidence by defendant (exhibit A, p. 3):

> * * * Special sensitized typesetting paper or film [7] is wetted in a special activator and is squeezed onto the print stage, or it is held on the stage with magnetic strips and the activator is applied with a hand applicator. The image is projected, distortion free, through a red filter that automatically swings out of place when the electronically controlled exposure is made by a foot switch. The image appears in black on the paper within seconds, as you simultaneously position the next letter through the red filter that returns to position in the light path. The operation is repeated letter by letter, and line by line on the same sheet of paper, which remains in full view throughout. *This ability to see the entire typesetting as you work, permitting easier composition and flexible positioning, is but one of the essential advantages of Staromat over other comparable phototypesetting equipment.* * * * [Italic added.]

The pamphlet further states that "The Starsettograph uses the same positive visual control system * * * as the Staromat" (exhibit 3).

Illustrating how a word is composed photographically under optical control, the specification of the patent reads (col. 2, lines 39–40): "The device used works *similar* to a photographic enlarger." [Italic added.] Significantly, the specification does not say that the device used "is" a photographic enlarger.

Although the imported machines are somewhat "similar" to enlargers, the common meaning of the term "enlarger" does not embrace the features incorporated in the imports that are designed to facilitate the selection and precise positioning of a series of continuously developing images (viz, type characters) according to the operator's design. As previously mentioned, these mechanisms include a font carrier for the selection of individual letters for exposure,[8] and a movable platen designed for the positioning of type. Also, as previously noted, the platen is tray-shaped so that the photosensitive paper or film can be moistened with developer fluid to permit the rapid positioning of a sequence of type characters, which is the key to the patented photocomposing process used by the instant machines. Consequently, each exposed letter immediately begins to develop,

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[7] The patent specification states (col. 2, lines 22-25): "These materials are approximately 200 to 300 times less sensitive than normal paper for photographic enlarging, and are *generally used for contact printing only.*" [Italic added.]

[8] Defendant's exhibit A, p. 3, states: "With a single conveniently-placed, multi-purpose, hand-sized control knob, the operator simultaneously changes magnification *and advances the font from letter to letter. Another lever automatically shifts from upper to lower case letters, or vice versa.*[Italic added.]

and the operator can position the red-filtered image of the following letter in relation to it.[9] Unlike photographic enlargers, the Staromat and Starsettograph incorporate a red filter that operates automatically to allow the positioning of type by visual reference to type already set. Further, unlike the light source in an enlarger, which is turned on and off for each exposure, the light source in the instant machines remains lit while an entire series of letters is being set, not only to prevent the uneven exposure and delay that would result if the light were turned on and off after each letter was set, but to illuminate the position of each letter before exposure.

It is undisputed that the imported machines perform photographic enlargement. The machines' enlargement feature permits the setting of an infinite number of type sizes within a certain range using a single font, which contributes to the efficiency and economy of the phototypesetting operation. Thus, specific sizes of type required for particular printing jobs are available without the necessity for having on hand many different sizes of characters, which was required when typesetting was performed by the old system of using metal fonts.

To summarize, the record establishes that while the imported machines perform photographic enlargement, such feature is ancillary to their sole function as typesetting machines.[10] In view of the machines' special features for the selection and positioning of type under optical control, defendant's characterization of the imports as enlargers is plainly simplistic. The short of the matter is that as phototypesetters, the imported machines represent something more than "enlargers" as such term is commonly defined, and consequently they are beyond the intended scope of item 722.18, TSUS. Cf. *E. Green & Son (New York), Inc.* v. *United States*, 59 CCPA 31, C.A.D. 1032, 450 F. 2d 1396 (1971); *United States* v. *Milton Diamond et al.*, 42 CCPA 9, C.A.D. 561 (1954).

2

In support of its classification of the imports as "enlargers," the Government urges the court to apply the well-established rule that an eo nomine designation of an article, without limitation or contrary legislative intent, judicial decision or administrative practice includes all forms of the article, *Nootka Packing Co. et al.* v. *United States*, 22 CCPA 464, T.D. 47464 (1935). In this connection, defendant posits that the imports are "nothing more than specialized enlargers" (brief, at 19), citing *Fairchild Camera & Instrument Corp. et al.* v.

[9] Plaintiff's witness Owen testified that he had never seen an easel of a photographic enlarger which was designed to hold a developer in a tray at the time of exposure; that he had never seen paper coated with a developer at the time of exposure used in a photographic enlarger; and that the operator of a photographic enlarger does not want the image to start appearing on the sensitized paper at the time of the exposure (R. 111-12).

[10] Defendant's witness Fielder conceded that various machines which set type photographically on sensitized paper or film and have enlarging capability are typesetting machines (R. 159-63).

United States, 53 CCPA 122, C.A.D. 887 (1966), and *United States* v. *Carl Zeiss, Inc.*, 27 CCPA 12, C.A.D. 54 (1939).

In *Fairchild Camera*, certain photofluorographic cameras, together with certain items of auxiliary equipment, were classified by the Government as photographic cameras under paragraph 1551 of the 1930 Tariff Act. There, plaintiff claimed that the imports were more than cameras, and that their proper classification was under the provision in paragraph 353 of the act covering electric X-ray apparatus, instruments, and devices. The Court of Customs and Patent Appeals found that the imports were special-purpose cameras designed solely for taking photofluorographic pictures in connection with an X-ray system known as photofluorography. In addition to their use for picture taking, it appeared that the imports were consistently described in sales literature as cameras, and the witnesses admitted that they were cameras. Citing the *Zeiss* case, our appellate court held that in classifying the imports as cameras it was unimportant that they were not adapted to general picture taking, but were special purpose cameras designed to photograph but one particular object.

In *Zeiss*, certain cameras used solely for purposes of photographing the retina of the eye for ophthalmological purposes, and which could not be used for any other purpose, were held to be classifiable as photographic cameras under paragraph 1551 of the 1930 Tariff Act, as claimed by the importer, rather than as testing or recording instruments for opthalmological purposes, as classified by the Government. The Court of Customs and Patent Appeals held that the mere fact the cameras were used exclusively to photograph a particular object for a special purpose did not change their status as photographic cameras.

Fairchild Camera and *Zeiss* are factually distinguishable from the present case. In both cases, the subject cameras, although intended for specialized uses, were designed solely for picture taking. Significantly too, in *Fairchild Camera* the merchandise was described in the sales literature as cameras, and the witnesses admitted that the articles were cameras. In sharp contrast, here the record shows that the Staromat and Starsettograph were not designed for the purpose of enlarging photographs, and that enlargement is but merely one phase of the machines' phototypesetting function. Moreover, the imported machines are not referred to in the sales literature as photographic enlargers, but rather as phototypesetters. In a word, the record establishes that the Staromat and Starsettograph are specialized phototypesetters rather than specialized enlargers.

3

We now consider defendant's contention that legislative history supports its classification of the imports as enlargers. On this aspect,

defendant points to the "Explanatory Notes to the Brussels Nomenclature." It must be recognized that the "Explanatory Notes" may properly be referred to as an aid to interpreting the provisions of the TSUS where there is a "close similarity in the wording" of the two provisions. *United States* v. *Abbey Rents*, 66 CCPA 2, n. 5, C.A.D. 1213, 585 F. 2d 501 (1978). Accordingly, it is appropriate to initially examine the language of the Brussels provisions relied upon by defendant. These provisions read:

> 84.34—Machinery, Apparatus and Accessories for Type-Founding or Type-Setting; * * *
>
> * * * * * * *
>
> 90.09—Image Projectors (Other Than Cinematographic Projectors), Photographic (Except Cinematographic) Enlargers and Reducers.

It is immediately apparent that there is no "close similarity in the wording" of the Brussels provisions quoted above and TSUS items 668.25 and 722.18. However, inasmuch as both parties heavily rely upon the "Explanatory Notes to the Brussels Nomenclature" in support of their respective positions, further discussion of Brussels is warranted.

The "Explanatory Notes," volume III, pages 853–54, indicate that Brussels heading 84.34 excludes "photographic enlargers or reducers," but includes "phototypesetting and composing machines which actually set type even though the type is photographed after it has been set." With respect to the latter machines, the "Notes" go on to explain (at p. 854):

> * * * These machines operate, for example, by successively photographing characters mounted on revolving discs, or by photographing the face of special matrices. They either incorporate a keyboard or similar device, or are operated from paper bands previously perforated on a separate machine * * *.

Although the instant-display phototypesetters do not operate in the precise manner described above, they are nevertheless "phototypesetting and composing machines which actually set type even though the type is photographed after it has been set." I conclude, therefore, that the imports are within the purview of heading 84.34 of the Brussels nomenclature.

Defendant, however, insists that the Staromat and Starsettograph are "photographic enlargers and reducers of the type used in the preparation of printing plates and cylinders for the printing industry" within the ambit of Brussels heading 90.09 ("Explanatory Notes," vol. III, p. 1031), and that the machines fall within the following definition of photographic enlargers and reducers (ibid.):

> * * * These usually consist of a light source, a diffusing screen or a condensing lens, a negative holder, one or more ob-

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jectives with a focusing device (often automatic), and an easel for supporting the sensitized paper; these parts are mounted on an adjustable vertical or horizontal support.

The type selection and positioning features, discussed supra, which exclude the instant machines from the common meaning of the term "enlarger," also exclude them from the above-quoted definition. To reiterate briefly, the imports operate similarly to photographic enlargers, but "in addition" possess the mechanisms for the rapid and precise positioning of type under optical control, which is the essence of the patented photocomposing process for which the machines were designed. Plainly, then, these additional features make the imports typesetting machines within the purview of Brussels heading 84.34, rather than photographic enlargers covered by item 90.09.

In summary, I do not find the nexus, asserted by defendant, between the Brussels and TSUS provisions predicated upon similarity of wording. Moreover, I find the TSUS provisions for typesetting machines and enlargers in items 668.25 and 722.18 to be clear and unambiguous, and consequently resort to legislative history is unnecessary and would be erroneous. *United States* v. *Corning Glass Works, supra; C. J. Tower & Sons* v. *United States*, 41 CCPA 195, C.A.D. 550 (1954); *Continental Manufacturing Co. et al.* v. *United States*, 82 Cust. Ct. 187, C.D. 4800 (1979). Indeed, assuming arguendo that resort to the Brussels nomenclature were necessary in this case, the "Explanatory Notes" support plaintiff's position.

4

It is well settled that in a classification case, the importer has a dual burden of proof: First, it must be shown that the Government's classification is erroneous; second, the importer must establish the correctness of its claimed classification. *Daisy-Heddon, Div. Victor Comptometer Corp.* v. *United States*, 66 CCPA 97, C.A.D. 1228, 600 F. 2d 799 (1979).

Having concluded that the imports are more than enlargers within the purview of item 722.18, TSUS, we now turn to assessing defendant's argument that plaintiff has failed to prove that the imports are classifiable as typesetting machines under item 668.25 because the machines have no keyboard.

In support of its argument that the provision for typesetting machines in item 668.25 is restricted to machines having keyboards, defendant cites *Lanston Industries, Inc.* v. *United States*, 49 CCPA 123, C.A.D. 807 (1962).

Lanston involved certain monophoto machines that were classified by the Government as photographic cameras under paragraph 1551, Tariff Act of 1930, and were claimed by the importer to be classifiable as typesetting machines under paragraph 1643, Tariff Act of 1930.

As in the case of the present devices, the monophoto machines set or composed type photographically. In determining whether the monophoto machines were classifiable as typesetting machines, our appellate court compared them with the older, well-known monotype typesetting machines, which utilized a hot-metal casting operation controlled by a keyboard-operated, tape-punching apparatus. Judge Rich, writing for a majority of the court, pointed out the similarities between the older monotype machines and the newer monophoto machines, and concluded that the monophoto machines were nothing more than a technical advance in typesetting which Congress must have foreseen. Further, Judge Rich admonished against trying "to search out nice differences between one kind (of typesetting machine) and another or exclude improvements" (49 CCPA at 128).

Although the court pointed out in *Lanston* that keyboard operation was one of the similarities between the monotype and monophoto machines, I do not read the court's opinion to hold that keyboard operation is a sine qua non of a typesetting machine. On the contrary, the ratio decidendi of *Lanston* is that technological advancements in the typesetting art will be judicially recognized in determining whether a particular device is classifiable as a typesetting machine, and that such classification is not restricted to machines that operate in a particular mode.

In the later case of *United States* v. *Consolidated International Equipment & Supply Co.*, 58 CCPA 145, C.A.D. 1018, 442 F. 2d 376 (1971), certain "multineg" or "step and repeat" machines that prepared printing plates by photocomposition, were held classifiable as typesetting machines under paragraph 1643, Tariff Act of 1930, following the rationale of *Lanston*, notwithstanding the fact that the multineg machines had no keyboard The appellate court held in a per curiam opinion (58 CCPA at 146–47):

> We agree in particular with the findings of the Customs Court that the involved machines embody *a function* which bears an essential resemblance to and is a technological advancement over the basic process of lithography, and with its holding that the rationale of our decision in *Lanston Industries, Inc.* v. *United States*, 49 CCPA 123, C.A.D. 807 (1962) thus requires that these machines be treated for tariff purposes as coming under the eo nomine provision designed to cover machines which carry out that process. *The function of the lithographing process involves the setting of type by means of photocomposing on sensitized material.* Since lithography was in existence on the date of enactment of the 1930 act and clearly had to be included within the duty-free provision for "all typesetting machines" in paragraph 1643 of that act and since the involved machines "are used by the same trade, the same people, and for substantially the same purpose, *viz*, the production of printing plates," it follows that they should also be

entitled to classification under the provisions of that paragraph. [Italic added.]

The machines presently before us, like those in *Lanston* and *Consolidated International*, set or compose type by photographic means on sensitized material, and thus represent a technological advance in typesetting. Hence, the rationale of those cases is apposite here. Those cases teach that such technological advancements in typesetting as photocomposition are within the purview of the tariff provision for "typesetting machines." The fact that the Staromat and Starsettograph are special-purpose display phototypesetters without a keyboard and are suitable only for typesetting jobs involving a small amount of text, such as for a headline or advertisement, in contrast to the high-speed keyboard machines used for voluminous standarized text for newspapers or books, does not preclude classification of the imports under the eo nomine provision for typesetting machines, in accordance with their design and function. Cf. *United States* v. *Besler*, *supra* (special purpose cameras "held" not precluded from classification as cameras). Since I have determined that the merchandise in issue is a form of typesetting machine, I am persuaded this case is controlled by the well-established rule, mentioned supra, that an eo nomine designation without limitation includes all forms of the article. *United States* v. *National Carloading Corp.*, *supra*, at 74.

The conclusion reached herein that, as phototypesetters, the imports are classifiable under item 668.25, TSUS, is also confirmed by the following statement in 8 "Summaries of Trade and Tariff Information" (1969), schedule 6, page 247–48: [11]

> There are several typesetting methods in common use; the more important ones are hand typesetting, Linotype and Intertype, Monotype, Ludlow, *phototypesetting*, computer typesetting, and cold typesetting.
>
> * * * * * * *
>
> Phototypesetting represents modifications of the already existing methods, providing a fast, low-cost method of typesetting. In this method the melting pot and mold are replaced by a photographic unit. Newer types of phototypesetting systems are tape-controlled. The necessity of making proofs, required by metal linecasting machinery, is eliminated. The reproduction is generally of very high quality. Phototypesetting methods are used for business forms, book printing, and classified sections of newspapers. [Italic added.]

It may be noted that keyboard operation is not mentioned by the Tariff Commission (now International Trade Commission). Addition-

[11] The "Summaries of Trade and Tariff Information" have been frequently referred tc as an aid in determining the scope of tariff provisions. See e.g.: *Pistorino & Co., Inc.* v. *United States*, 66 CCPA 95, C.A.D. 1227, 599 F. 2d 444 (1979); *American Bristle & Hair Drawing Co. et al.* v. *United States*, 59 CCPA 104, C.A.D. 1048, 456 F. 2d 524 (1972); *Tamross Supply Co., Inc.* v. *United States*, 58 CCPA 26, 31, C.A.D. 1000, 433 F. 2d 1332 (1970). See also *Lyons Export & Import, Inc.* v. *United States*, 59 CCPA 142, 144, C.A.D. 1056, 461 F. 2d 830 (1972); *The Englishtown Corporation* v. *United States*, 64 CCPA 84, C.A.D. 1187, 553 F. 2d 1258 (1977).

ally, it should be observed that defendant's witness Fielder defined a "typesetter" [12] as: "A device that generates characters that are eventually to be mass produced in a printing process" (R. 159). This definition also makes no mention of keyboard operation.

Finally, since there is nothing in item 668.25, TSUS, that limits the provision to machines with keyboards, defendant's restrictive interpretation is fundamentally at odds with the statute. Assuming arguendo that at the time the TSUS became effective (Aug. 31, 1963) phototypesetters were operated by means of a keyboard, it is inconceivable that Congress would have intended to foreclose from classification under item 668.25 future innovations in typesetting. Appropos is the following apt comment by Judge Rich in *Lanston* (49 CCPA at 128): "We are also mindful of the truism that tariff acts are written for the future."

Concluding, I find that the machines involved in this case are more than enlargers as classified by the Government, and that they are in fact and law, typesetting machines entitled to entry free of duty pursuant to item 668.25, TSUS. Judgment will be entered accordingly.

(C.D. 4816)

OZEN SOUND DEVICES, PLAINTIFF *v.* UNITED STATES, DEFENDANT

On Plaintiff's Motion for Judgment on the Pleadings and Defendant's Cross-Motion for Summary Judgment

Court No. 78–3–00506

[Plaintiff's motion denied; defendant's cross-motion granted.]

(Dated August 7, 1979)

Mandel & Grunfeld (*Murray Sklaroff* on the briefs) for the plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Saul Davis* on the briefs), for the defendant.

MALETZ, Judge: This case concerns the proper tariff classification of merchandise which is virtually the same as the merchandise involved in *Mattel, Inc.* v. *United States*, 76 Cust. Ct. 84, C.D. 4639 (1976). In *Mattel*, articles invoiced as "voice units" which were inserted into dolls and other objects to reproduce prerecorded sentences or sayings were held to have been properly classified by Customs under item 737.90 of the Tariff Schedules of the United States (TSUS),

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[12] The term "typesetter" is synonymous with "typesetting machine." See "The Random House Dictionary of the English Language" (unabridged ed. 1969), p. 1533.

as modified by T.D. 68–9, as parts of toys, not specially provided for, rather than under item 685.32, as modified by T.D. 68–9, as phonographs, as the plaintiff-importer contended.

In the present case the imported merchandise was invoiced as "B. O. Talking Mechanisms with Record No. D453" (hereafter "talking mechanism"). The talking mechanism consists of a turntable, spindle, tone arm assembly, stylus, loudspeaker cone, and a record, and is the same in all material respects as the merchandise invoiced in *Mattel*, except that the merchandise in the present case is driven by a battery-operated electric motor rather than a clock spring and string mechanism.

In *Mattel*, the court held that the imported merchandise contained two separate and distinct essential elements (the phonograph device and the record) and therefore could not be classified under item 685.32, the eo nomine provision for phonographs, since the merchandise was "more than as well as other than the phonographs encompassed by item 685.32 * * *." [1] 76 Cust. Ct. at 91.

Plaintiff has moved for judgment on the pleadings in this case claiming that *Mattel* is not stare decisis of the issues involved in this case on the ground that: (1) Records have consistently been held to constitute parts of phonographs and, therefore, the talking mechanism is a phonograph within the scope of item 685.32;[2] (2) the talking mechanism is not "more than" a phonograph;[3] and (3) in any event, the talking mechanism is properly classifiable under item 688.40 as electrical parts of articles, not specially provided for, since that provision is assertedly more specific than item 737.95.[4]

Statutes Involved

Classified under [schedule 7, part 5, subpart E]:

Toys, and parts of toys, not specially provided for:

* * * * * * *

[1] In *Mattel*, it was undisputed that the voice units were parts of toys. It was also undisputed that the provision for phonographs in item 685.32 is a specific provision within the meaning of general interpretative rule 10(ij) which provides that a provision for "parts" of an article does not prevail over a specific provision for such part. See also headnote 1 of schedule 7, pt. 5, subpart E. Thus, in *Mattel*, if the imported articles were phonographs within the ambit of item 685.32, as claimed, then general interpretative rule 10(ij) and headnote 1 would require that the phonograph provision prevail over the item 737.90 "parts of toys" provision. In these circumstances, the single issue in *Mattel*—and the major issue here—was whether or not the importations constituted "phonographs" within the meaning of item 685.32. See 76 Cust. Ct. at 86.

[2] This argument was not presented or considered in *Mattel*.

[3] This argument was fully briefed and decided by the court in *Mattel*. However, plaintiff contends that in so holding the court erred.

[4] This argument was not presented or considered in *Mattel*.

737.95[5]	Other	17.5% ad val.
Claimed under [schedule 6, part 5]:		
* * * * * * *		
685.32	Record players, phonographs, record changers, turn-tables, and tone arms, and parts of the foregoing	5.5% ad val.
Alternatively claimed under [schedule 6, part 5]:		
688.40	Electrical articles, and electrical parts of articles, not specially provided for	5.5% ad val.

Also relevant is schedule 7, part 2, subpart G, item 724.25, which provides for "phonograph records * * *."

Against this background we consider first whether the decision in *Mattel* is stare decisis of the present action bearing in mind that "(a) decision in a prior case involving the same merchandise and the same issue is ordinarily stare decisis of the succeeding case." Sturm, "A Manual of Customs Law" (1974), page 368. However, in the present case several new arguments have been presented which were not raised or considered in *Mattel*. Additionally, plaintiff insists that *Mattel* was erroneously decided. In these circumstances, the court will not apply stare decisis. See, e.g., *Hertz* v. *Woodman*, 218 U.S. 205 (1910); *M. Pressner & Co.* v. *United States*, 56 Cust. Ct. 489, C.D. 2686 (1966).

This brings us to plaintiff's main contention that records have been consistently held to constitute parts of phonographs and that the talking mechanism is therefore a phonograph within the scope of item 685.32. In support of this contention, plaintiff relies on the following cases where the courts held that under the Tariff Acts of 1909, 1922, and 1930, records were parts of phonographs: *American Express Co. et al.* v. *United States*, 4 Ct. Cust. Appls. 279, T.D. 33490 (1913); *Louis Bauer* v. *United States*, 66 T.D. 1060, Abs. 29235 (1934); *Thomas & Pierson* v. *United States*, 44 T.D. 470, Abs. 46515 (1923).[6] Further, plaintiff places emphasis on *Landay Bros.* v. *United States*, 5 Ct. Cust. Appls. 498, T.D. 35151 (1915), where steel needles for phonographs, some of which were permanently fitted into the phonographs, were held to be parts of phonographs under the Tariff Act of 1909. As basis for this holding, the court pointed out that a phonograph without a needle was not a complete machine and that without these needles the phonograph could not reproduce sound. Thus, the court concluded that the needles in question "are just as much parts of phonographs as are the records to which such needles are applied

[5] On Jan. 1, 1976, item 737.90 was renumbered item 737.95. See Executive Order 11888, Nov. 24, 1975, effective Jan. 1, 1976. Apart from this renumbering, the two items are identical.

[6] Plaintiff also relies on *American Graphophone Co.* v. *Amet*, 74 Fed. 789 (N.D. Ill. 1896), where the circuit court held in a patent infringement case that records were integral parts of sound producing devices designed to make the devices usable and useful.

in order to reproduce sounds and are subject to the same tariff classification." 5 Ct. Cust. Appls. at 500. From this, plaintiff asserts that the court in *Landay* recognized that a phonograph with one of its essential parts (a needle), whether permanently attached or replaceable, was not more than a phonograph.

Additionally, plaintiff makes reference to the sixth protocol of supplementary concessions to the General Agreement on Tariffs and Trade, T.D. 54108 (effective June 30, 1956) (hereafter sixth protocol), where phonograph records for the first time were specifically referred to as parts of phonographs (with their rates reduced).[7] The provision of the Tariff Act of 1930, as modified by the sixth protocol, read as follows:

PAR. 1542	Parts of phonographs, gramophones, graphophones, or of similar articles, not specially provided for: Phonograph, gramophone, or graphophone records.

With these considerations in mind, plaintiff argues that the Tariff Schedules of the United States have not changed the situation that existed under the Tariff Act of 1930 and prior tariff acts. Hence, plaintiff concludes that since the component record is a part of the talking mechanism, the talking mechanism itself is nothing more than a phonograph within the scope of item 685.32.

There is a basic difficulty, however, with this argument. The difficulty is that in the enactment of the Tariff Schedules in 1962, Congress manifested a clear intent to "discontinue" the prior practice of treating records as parts of phonographs. Thus, Congress provided for phonographs "and their parts" in schedule 6, part 5 of TSUS, while it provided for "phonograph records" in schedule 7, part 2, item 724.25—a completely separate schedule within TSUS. This leads to the inescapable conclusion that the classification of the talking mechanism as a phonograph would frustrate the clear purpose of Congress' distinct and separate tariff treatment of records. For such classification would emerge the distinction Congress made between records and phonographs when it placed these articles in completely separate schedules of TSUS. The short of the matter is that had Congress intended that records continue to be treated as parts of phonographs, it would merely have enacted a provision for another subdivision under item 685.32 for "parts of phonographs: records" as was done in the sixth protocol. This it did not do. Instead of adopting the scheme set out in the sixth protocol, Congress in enacting the tariff schedules provided separate and distinct tariff treatment for phonographs (in item 685.32) and for phonograph records (in item 724.25).

[7] More specifically, he rate of records was reduced by the sixth protocol to 14 percent while the rate for phonographs, gramophones and graphophones remained the same at 30 percent. Subsequently the rates were further reduced.

Accordingly, it must be concluded that the talking mechanism in this case, due to the presence of the essential record portion, is more than or other than the phonographs provided for in item 685.32. See *Mattel, supra.* See also *Montgomery Ward & Co.* v. *United States,* 73 Cust. Ct. 187, C.D. 4573 (1974).

We consider lastly plaintiff's alternative claim for classification under item 688.40 as electrical parts of articles, not specially provided for. In support of this claim, plaintiff contends that item 688.40 is more specific than item 737.95, the provision for other toys and parts of toys, not specially provided for, under which the imported merchandise was classified. The contention is without merit. For it has been specifically held that item 737.90 (the predecessor of item 737.95 for parts of toys) is more specific than item 688.40 electrical parts of articles). *Ideal Toy Corp.* v. *United States,* 58 CCPA 9, C.A.D. 996, 433 F. 2d 801 (1970). See also *J E. Bernard & Co., Inc.* v. *United States,* 62 Cust. Ct. 536, C.D. 3822 (1969), *aff'd,* 58 CCPA 91, C.A.D. 1009 (1971).

For the reasons indicated, plaintiff's motion for judgment on the pleadings is denied; defendant's cross-motion for summary judgment is granted; and the action is dismissed.

(C.D. 4817)

WESTINGHOUSE TRADING COMPANY, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Translucent Alumina Tubes

Court No. 77-9-03272

[Judgment for plaintiff.]

(Decided August 7, 1979)

Barnes, Richardson & Colburn (*James S. O'Kelly* at the trial; *Richard Harvian* with him on the briefs) for the plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, Field Office for Customs Litigation (*Susan C. Cassell* at the trial and on the brief), for the defendant.

BOE, Judge: The imported merchandise in issue, consisting of translucent alumina tubes, commonly referred to as PCA tubes, was imported from Japan and entered at the port of New York between August 1976 and December 1976. The merchandise was classified under item 536.15, TSUS, providing:

Schedule 5, part 2, subpart E:

	Ceramic wares, and articles of such wares, not specially provided for:	
	* * * * * * *	
536.15	Other	20% ad val.

In the trial of the instant proceeding, however, the Government concedes that the subject merchandise was improperly classified under item 536.15, TSUS, and presently claims that the same is properly classifiable under item 536.11, TSUS, providing:

Schedule 5, part 2, subpart E:

	Ceramic wares, and articles of such wares, not specially provided for:	
536.11	Of porcelain or of subporcelain	22.5% ad val.

The plaintiff claims that the merchandise in question should be classified under item 535.14, TSUS, providing:

Schedule 5, part 2, subpart D:

	Ceramic magnets, ceramic electrical insulators whether or not in part of metal, and other ceramic electrical ware, including ferroelectric and piezoelectric ceramic elements:	
	* * * * * * *	
535.14	Other	15% ad val.

From the evidence adduced it is undisputed that the translucent tubing is manufactured in accordance with the specifications prepared by the plaintiff for use exclusively in the United States in the manufacture of electrical sodium discharge lamps.[1] The tubing is manufactured from a polycrystalline alumina material, the chemical constituency of which is the oxide of aluminum. The plaintiff's specifications require a purity standard of 99.7 percent and a melting point of 2040°C in order to insure the tube to be able to withstand an internal temperature of 1200° to 1300°C during the course of its operation.

Except for cleansing from accumulated dust or dirt, the PCA tubing upon importation is ready for use and assembly. The assembly process is initiated by affixing at each end of the tube a niobium formed cap with "tubular portions" extending therefrom and tungsten electrodes extending within. A vitreous material is filled between the cap and the tube, which when heated in a vacuum furnace to a temperature of about 1300°C seals the cap on either end of the

[1] The record consists of the testimony of one witness, Vernon L. Plagge, a ceramics engineer employed by the plaintiff since 1941, and 8 exhibits introduced by the plaintiff. The defendant rested its case without the introduction of any evidence.

PCA tube. In a simultaneous process the open end of the niobium tube is filled with sodium amalgam, consisting of sodium and mercury, while air is removed from the tube and replaced with xenon gas. The PCA tube is thereupon sealed and mounted on a structure for encapsulation and sealing within an outer bulb. Because of the high degree of temperature at which the PCA tube operates, it is necessary to exhaust all air from the outer bulb thereby providing a vacuum to protect the metal caps affixed at the end of each enclosed PCA tube from oxidation. By connecting an electric current to the lamp as fully assembled, electrons pass in the form of an arc through the sodium and mercury vapor amalgam contained in the PCA tube causing a light to be produced and emitted therefrom.

In addition to conceding that the classification of the imported merchandise in issue under item 536.15, TSUS, is incorrect, the Government in its answer admits that the imported PCA tubes are used exclusively to make electric discharge lamps and that the same are used exclusively in electric articles or devices.[2]

In view of the defendant's concession that the official classification under item 536.15, TSUS, was erroneous, the plaintiff has been relieved of the initial onus of its dual burden of proof. See e.g., *United States* v. *New York Merchandising Co.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970). There is no dispute that the merchandise involved in this case is ceramic articles. Compare *Sprague Electric Co. et al.* v. *United States* (*Montgomery Ward & Co., Party-in-Interest*) 64 Cust. Ct. 135, 144–46, C.D. 3972 (1970). Thus, the sole remaining issue in this action is whether the plaintiff has demonstrated that the merchandise is appropriately described by item 535.14, TSUS, as "* * * ceramic electrical insulators * * * (or) other ceramic electrical ware." If answered affirmatively, the plaintiff must prevail since item 535.14 is more specifically descriptive than the defendant's claimed alternative item, 536.11, TSUS, which is, in effect, a "basket" provision for certain ceramic articles not specifically provided for. See "Tariff Classification Study, Explanatory and Background Materials," schedule 5, at 96 (1960).

The plaintiff's witness, Plagge, testified unequivocally that the imported PCA tubes are ceramic electrical insulators because they serve to resist the flow of electricity in their use in the sodium discharge lamp. The defendant does not dispute the fact that the PCA tubes serve as electrical insulators. Rather, the defendant maintains that the tubes are "more than" or "other than" electrical insulators in a tariff sense because they serve various essential functions in the sodium lamps in addition to electrical insulation.

It is unnecessary for this court to determine whether the imported PCA tubes are "more than" or "other than" ceramic electrical in-

[2] Pars. 9 and 11 of defendant's answer.

sulators. Assuming arguendo the validity of this contention, they, nevertheless, fall squarely within the provision for "other ceramic electrical ware" in item 535.14, TSUS. As was stated by our appellate court in *United States* v. *Mitsubishi International Corp.*, 60 CCPA 79, 82, C.A.D. 1085, 470 F. 2d 1387 (1973):

> [I]t is our opinion that a ceramic insulator is not a separate class but a species of the broader class of ceramic electrical ware. * * *

It is undisputed that the PCA tubes perform a number of essential functions in an electrical article, that is, the high-pressure sodium lamp. A tube is required to possess extreme heat-resisting qualities, to serve as an insulator against the electronic impulses applied at either end of the tube, resist the corrosion resulting from the sodium vapor and be sufficiently translucent to permit the emission of light. The testimony of plaintiff's witness, Plagge, was uncontradicted that the extensive production of high-pressure sodium lamps was not economically feasible until the invention of the PCA tube in the early 1960's. Again it is pointed out, the defendant has admitted that the imported PCA tubes are designed for and solely and exclusively used in the production of the electric discharge lamps. These factors provide ample and convincing evidence that they are properly described as ceramic electrical ware. See *United States* v. *Mitsubishi International Corp.*, *supra*.

Nevertheless, the defendant contends that, as imported, the PCA tubes have no electrical component, and are therefore not ceramic electrical ware. According to the defendant, only after further processing in this country—the assembly of the electrode structure, the capping of the ends to form a closed tube, the encapsulation of gas within the tube, and heat treatment to fuse the caps or ends—do the articles possess an electrical component, and thus become electrical ware.

The defendant's contention must be rejected. Though no all-encompassing definition for the term "ceramic electrical ware" need be attempted, such definition surely includes articles such as the imported PCA tubes which are designed and exclusively used for the production of an electrical device. The fact that the articles have no electronic component at the time of importation is not dispositive. As the U.S. Tariff Commission stated in its "Tariff Classification Study," schedule 5, at 95:

> Item 535.14 does not embrace switches, fuses, receptacles, lamp sockets, resistors *and other electrical articles which are to be connected into electrical circuitry.* (These are specifically provided for in part 5 of schedule 6.) * * * [Italic added.]

Those articles which are advanced to the point of being capable of connection into electrical circuitry are classifiable, not as electrical ware, but as discrete electrical articles. Thus, once the processing about which defendant is concerned takes place, it appears the resulting article would no longer be classifiable as "ceramic electrical ware" under item 535.14, but as an electrical article per se in part 5 of schedule 6.[3] Cf. *United States* v. *Mitsubishi International Corp.*, *supra*, at 84.

Further support for this interpretation also can be found from the facts in the *Mitsubishi* case, *supra*. The merchandise involved in that action consisted of ceramic "housings" which served as exterior covering and insulation for lightning arresters. From the trial court's description of the merchandise, with which our appellate court did not disagree, it appears that, as imported, the housings possessed no electrical component, and were solely composed of a one-piece, circular ceramic construction. See *Mitsubishi International Corp.* v. *United States*, 66 Cust. Ct. 413, 415–16, C.D. 4227 (1971), *rev'd*, 60 CCPA 79, C.A.D. 1085, 470 F. 2d 1387 (1973). This absence of an electrical component at the time of importation did not prevent the appellate court from holding the "housings" to have been properly classified as "other cernamic electrical ware" under item 535.14. *See* 60 CCPA at 83.

As a caveat to the foregoing, the decision herein should not be viewed as holding any ceramic article which could conceivably be used in an electrical device is, therefore, ceramic electrical ware within the intendment of the TSUS. Each case necessarily must be determined upon its own facts and the nature of the merchandise in issue. However, as in this case, where the record convincingly demonstrates that an imported ceramic article is designed and used solely as an essential component part of an electrical device, then that ceramic article is properly classifiable as ceramic electrical ware under item 535.14.

The claim of the plaintiff is sustained.

Let judgment be entered accordingly.

(C.D. 4818)

RMS ELECTRONICS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Transformers

Consolidated Court No. 75–8–02067

Merchandise known as baluns, impedance matching couplers, or matching transformers classified under item 682.05, Tariff Sched-

[3] See e.g., item 687.10, TSUS.

ules of the United States, as transformers rated at less than 1 kVA, "held" properly subject to classification as "Other" transformers as provided for under item 682.07, Tariff Schedules of the United States.

In the absence of a commercial designation or a contrary legislative intent, the language of a tariff statute is to be construed in accordance with its common meaning. *Trans-Atlantic Company* v. *United States*, 60 CCPA 100, C.A.D. 1088, 471 F. 2d 1397 (1973).

Common meaning is not a question of fact, but a question of law to be decided by the court. *United States* v. *National Carloading Corp. et al.*, 48 CCPA 70, C.A.D. 767 (1961).

The term "transformer" is an eo nomine designation. In *United States* v. *Charles R. Allen, Inc., et al.*, 37 CCPA 110, C.A.D. 428 (1950), the court held that an eo nomine designation that is limited does not include all forms of the article, but only those embraced by the language of the provision.

While the record reflects the imported articles not to be capable of handling 1 kVA, they are nevertheless not embraced by the statutory language since they are not "rated."

Congress is presumed not to have used useless language and, accordingly, significance must be attached to the use of the phrase "Rated at less than 1 kVA." *Carey & Skinner, Inc.* v. *United States*, 42 CCPA 86, C.A.D. 576 (1954).

[Judgment for plaintiff.]

(Decided August 8, 1979)

Sharretts, Paley, Carter & Blauvelt, P.C. (*Peter Jay Baskin* at the trial; *Raymond F. Sullivan, Jr.*, with him on the brief), for the plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Edmund F. Schmidt* at the trial; *Bruce M. Mitchell* on the brief), for the defendant.

FORD, Judge: The Customs authorities at the Port of New York assessed duty on certain articles known as baluns, impedance matching couplers, or matching transformers at the rate of 12.5 per centum ad valorem under item 682.05, Tariff Schedules of the United States, as modified by T.D. 68–9, which provides for transformers rated at less than 1 kVA.

Plaintiff, in challenging the assessment, contends the importations are dutiable at only 5 per centum ad valorem as television apparatus and parts, as provided for under item 685.20, Tariff Schedules of the United States, as modified by T.D. 68–9. Alternatively, plaintiff contends if the court finds the articles to be transformers, they are nevertheless dutiable at only 6 per centum ad valorem under the provision for "Other" as set forth in item 682.07, Tariff Schedules of the United States, as modified by T.D. 68–9.

The pertinent statutory provisions provide as follows:

Generators, motors, motor-generators, convertors (rotary or static), trans-		

	formers, rectifiers and rectifying apparatus, and inductors; all the foregoing which are electrical goods, and parts thereof:	
	Transformers:	
682.05	Rated at less than 1 kVA	12.5% val.
682.07	Other	6% ad val.
*	* * * * * *	*
	Radiotelegraphic and radiotelephonic transmission and reception apparatus; radiobroadcasting and television transmission and reception apparatus, and television cameras; record players, phonographs, tape recorders, dictation recording and transcribing machines, record changers, and tone arms; all of the foregoing, and any combination thereof, whether or not incorporating clocks or other timing apparatus, and parts thereof:	
	Radiotelegraphic and radiotelephonic transmission and reception apparatus, radiobroadcasting and television transmission and reception apparatus, and parts thereof:	
685.20	Television apparatus, and parts thereof	5% ad val.

General Headnotes and Rules of Interpretation

* * * * * * *

10. *General interpretative rules.*—For the purposes of these schedules—

* * * * * * *

(ij) a provision for "parts" of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part.

The record consists of the testimony of two witnesses called on behalf of plaintiff and receipt in evidence of 13 exhibits. Defendant offered the testimony of two witnesses and eight exhibits.

Mr. Arthur Fink, president of plaintiff corporation, identified exhibits 1–5 as the merchandise involved in this action. Mr. Fink's duties included overseeing the general operation of the company, as well as supervising imports. The witness testified the imported merchandise was used to match impedance between 300-ohm wire and 75-ohm coaxial cable, the type of cable most frequently used in home cable TV installations.

The witness testified the involved articles are described as a balun, a matching transformer, or an impedance matching coupler. The

witness identified exhibits 6 and 7 as 75-ohm coaxial cable and 300-ohm wire respectively.

Plaintiff's exhibit 5, model CA–2600F, differed from exhibits 1–4 since it consisted of a balun and high-pass filter. The high-pass filter is used to eliminate CB radio interference from TV reception. Exhibits 8 and 8A are high-pass filters. Exhibit 5 according to the witness performs two separate coequal functions.

Mr. Fink testified in his opinion the articles of merchandise which his company sells were not transformers although referred to as matching transformers since devices performing the same function originally included a transformer. According to the witness who was not "a technical man," the involved articles are not transformers since they have nothing to do with electricity or power.

On cross-examination, the witness testified the articles at bar were imported and sold by his company for the sole purpose of TV antenna installations, and he was not aware of any use with FM radio or ham radio.

Mr. Argyle W. Bridgett, consultant in electrical and electronics engineering, was thereafter called by plaintiff. The witness testified that a transformer is a device utilizing electromagnetic induction whereby changes in current in one circuit are transformed into changes in voltage and current in another circuit. Various other definitions of the term "transformers" were read to the witness which he acknowledged are consistent with his understanding of the term. According to Mr. Bridgett the essential character of all such devices is the principle of electromagnetic induction. The witness agreed that the imported articles did in fact contain two or more sets of coils and ferrite cores. Exhibits 1–5, according to the witness, are not transformers since they do not operate on the principle of electromagnetic induction. Their sole function is to match the impedance. Matching is achieved by using two lines, each made of two wires having an impedance of 150 ohms. The lines are connected in parallel to the 75-ohm side and in series to the 300-ohm side which achieves the desired match through the method of wiring rather than electromagnetic induction. Mr. Bridgett further testified that exhibit 5 consists of a balun and a high-pass filter which perform two coequal functions. The witness testified that electromagnetic induction is an unavoidable natural phenomenon and will occur between two circuits or two wires. However, the subject articles are designed to reduce the effects of electromagnetic induction.

Defendant called Mr. Thomas Polis, director of technical service and international sales for Magnavox Systems, Inc. The witness testified that his company sells matching impedance transformers. A sample of the model T–26 with the case removed is received in evidence as

defendant's exhibit D.[1] According to the witness, exhibit D is used to match 75 ohms to 300 ohms and has always been called a matching transformer. Electricity is present in an antenna system in small amounts. If plaintiff's exhibits 1–5 were rated, the rating would be less than 1 kVA.

Mr. Polis' testimony with respect to plaintiff's exhibit 11 (model CA–2500) was to the effect that electromagnetic induction takes place on both sides of the ferrite material. In his opinion the imported article operates as transformers and is commonly known as a transformer. In matching transformers, electromagnetic induction is a critical portion of the operation. The circuits in a matching transformer are shielded to reduce "mutual induction" since without the shielding it is possible that 75-ohm to 300-ohm impedance match would not occur. Mr. Polis had never seen matching transformers with a kilovolt-ampere rating.

Mr. Ronald Gilgenbach, called on behalf of defendant, is a research assistant at Columbia University where he is conducting electromagnetic research for his Ph. D. in electrical engineering. He is on an educational leave of absence from Bell Telephone Laboratories. The witness testified that the involved articles are operated as transformers using the principle of electromagnetic induction.

Mr. Gilgenbach testified that each article contained two transformers which are interconnected to provide a 300-ohm balance output with a 75-ohm unbalanced input. According to the witness, exhibit 5 is both balun and a filter which perform two unrelated functions. The imported articles would have a rating of less than 1 kVA since the wires of the circuit would not be able to withstand 1 kVA.

Defendant, in its brief, has conceded that item CA–2600F has two coequal functions, and the testimony has demonstrated said merchandise to be properly subject to duty under item 685.20, Tariff Schedules of the United States. Judgment will be issued accordingly.

The record establishes that the balance of the merchandise (exhibits 1–4) is utilized to match a 300-ohm antenna to a 75-ohm coaxial cable. The merchandise is referred to in the trade interchangeably as baluns, transformers, or matching transformers. The court notes plaintiff's exhibits 2 and 3 are described on the packaging and the instruction sheets as matching transformers. Defendant's exhibit A, the "spec" sheet from plaintiff's catalog, describes plaintiff's exhibits 2, 3, and 4 as a matching transformer or balun.

It is axiomatic in the field of Customs jurisprudence that Congress is presumed to know the language of commerce and has framed tariff

[1] Exhibit D offered but not received in evidence at trial is hereby received in evidence.

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acts so as to classify commodities according to the general usage and denomination of the trade. *Nylos Trading Company* v. *United States*, 37 CCPA 71, C.A.D. 422 (1949). In the absence of a commercial designation or a contrary legislative intent, the language of a tariff statute is to be construed in accordance with its common meaning. *Trans-Atlantic Company* v. *United States*, 60 CCPA 100, C.A.D. 1088, 471 F. 2d 1397 (1973). Neither party has adduced proof of a commercial designation which differs from the common meaning.

Common meaning is not a question of fact, but a question of law to be decided by the court. Accordingly, the testimony of witnesses is merely advisory and not binding upon the court. *United States* v. *National Carloading Corp., et al.*, 48 CCPA 70, C.A.D. 767 (1961). The court, in determining common meaning, may rely upon its own understanding of terms used and consult dictionaries and other lexicographic authorities. *Trans-Atlantic Company* v. *United States*, *supra*. The nomenclature of articles of a technical nature is not always reflected in dictionaries prepared for general use, in which case the court may consult technical sources. *C. J. Tower & Sons of Buffalo, Inc., et al.* v. *United States*, 69 Cust. Ct. 105, C.D. 4379, 351 F. Supp. 604 (1972), *aff'd*, 61 CCPA 74, C.A.D. 1124, 496 F. 2d 1219 (1974); *E. Dillingham, Inc.* v. *United States*, 61 CCPA 34, C.A.D. 1114, 490 F. 2d 967 (1974).

Lexicographic authorities recognize that there is more than one form of transformer. Van Nostrand's Scientific Encyclopedia 1873 (fourth ed. 1968), describes various types of transformers under the general heading of transformer:

> *Matching transformer.*—A transformer used for impedance matching.

14 McGraw-Hill Encyclopedia of Science and Technology 34 (1971) recognizes that impedance matching is a function accomplished by a transformer:

> * * * In general, the transformer accomplishes one or more of the following between two circuits * * * (4) a difference in impedance level * * *.

The foregoing definitions embrace the imported articles and the record establishes they are known, bought and sold in the trade as matching transformers or baluns and, accordingly, are transformers.

In view of the finding, it is unnecessary to discuss at length plaintiff's primary claim as television apparatus and parts. Suffice it to say that since the merchandise is specifically provided for, the application of rule 10(ij) prohibits classification under said provision.

The finding by the court that the imported articles are transformers presents to the court for determination the proper classification of the

transformers. Item 682.05, supra, under which classification was made, utilizes the language, "Rated at less than 1 kVA," while the alternative claim by plaintiff under item 682.07, supra, is for "Other."

The term "transformer" is an eo nomine designation. In *United States* v. *Charles R. Allen, Inc., et al.*, 37 CCPA 110, C.A.D. 428 (1950), the court held that an eo nomine designation that is limited does not include all forms of the article, but only those embraced by the language of the provision. While the record reflects the imported articles not to be capable of handling 1 kVA, they are nevertheless not embraced by the statutory language since they are not "rated." Congress is presumed not to have used useless language and, accordingly, significance must be attached to the use of the phrase, "Rated at less than 1 kVA." *Carey & Skinner, Inc.* v. *United States*, 42 CCPA 86, C.A.D. 576 (1954). The term "Other," set forth in item 682.07, supra, includes transformers rated at more than 1 kVA or those not rated.

In view of the foregoing, the balance of the imported merchandise (models MA–730, ATR–375, CA–2500, and CA–2100) is properly subject to classification under item 682.07, supra, as claimed.

Judgment will be entered accordingly.

(C.D. 4819)

PIER I IMPORTS, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Fish netting—Fishnets—Lace or net articles of cotton

Court No. 75–1–00100

Imported merchandise which at the most is purchased, sold and advertised as "fishnet" or "fish netting", is similar in its construction to "fishing net", but is probably not sufficiently durable for use in catching fish.

HELD, not properly classifiable as fish netting and fishing nets under TSUS item 355.35 as claimed by plaintiff, but was properly classified by Customs as lace or net articles under TSUS item 386.04.

TARIFF TERMS—COMMON AND COMMERCIAL MEETING

Tariff terms are ordinarily written in the common meaning of the terms and no different commercial designation having been suggested or shown, the common meaning is presumed to be the same and controlling. *E. Dillingham, Inc.* v. *United States*, 30 Cust. Ct. 187, C.D. 1518 (1953), *aff'd*, 41 CCPA 221, C.A.D. 555 (1954); *Swan* v. *Arthur*, 103 U.S. 597 (1881) and *Trans-Atlantic Company* v. *United States*, 60 CCPA 100, C.A.D. 1088, 421 F. 2d 1397 (1973).

[Judgment for defendant.]

(Decided August 24, 1979)

Glad, Tuttle & White (*T. Randolph Ferguson* at the trial and on the brief) for the plaintiff.

Alice Daniel, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Robert H. White* at the trial and on the brief), for the defendant.

LANDIS, Judge: This classification case involves seven importations from Japan, invoiced as "cotton fishing net," which entered the port of Los Angeles during the period May 1973 through May 1974. The merchandise was classified under TSUS item 386.04, as modified by T.D. 68–9, as "Articles not specially provided for, of textile materials: Lace or net articles, whether or not ornamented, * * * Of cotton". Plaintiff claims the merchandise should properly be classified under TSUS item 355.35, as modified by T.D. 68–9, as cotton fish netting. The full item numbers are set out below.*

The nub of the case is whether plaintiff has made a showing that the imported merchandise is "fish netting" within the meaning of the tariff schedules. It is the determination of the court that the plaintiff shall not prevail and that the classification by Customs is sustained.

In order to ascertain the common meaning of "fishnets," reference is made to *Webster's Third New International Dictionary of the English Language, Unabridged* (1966), which defines "fishnets" as, viz, "netting fitted with floats and weights or with a supporting frame often oval for catching fish." No different commercial designation has been

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* *Classified under:*

SCHEDULE 3.—TEXTILE FIBERS AND TEXTILE PRODUCTS

Part 7.—Miscellaneous Textile Products; Rags and Scrap Cordage

* * * * * *

Subpart B.—Textile Articles Not Specially Provided For

Subpart B headnote:

1. This subpart covers articles, of textile materials, not covered elsewhere in the tariff schedules.

	Articles not specially provided for, of textile materials:	
	Lace or net articles, whether or not ornamented, and other articles ornamented:	
386.04	Of cotton	40% ad val.

Claimed under:

SCHEDULE 3.—TEXTILE FIBERS AND TEXTILE PRODUCTS

Part 4.—Fabrics of Special Construction or For Special Purposes: Articles of Wadding or Felt; Fish Nets; Machine Clothing

* * * * * *

Subpart C.—Wadding, Felts, and Articles Thereof; Fish Netting and Nets; Artists' Canvas; Coated or Filled Fabrics; Hose; Machine Clothing; Other Special Fabrics

Subpart C headnotes:

1. The provisions of this subpart do not cover—

* * * * * * *

(iv) fish landing nets (see part 5B of schedule 7);

* * * * * * * *

(vii) other articles specially provided for in schedule 7 or elsewhere.

* * * * * * * *

	Fish netting and fish nets (including sections thereof), of textile materials:	
355.35	Of cotton	17.5% ad val.

suggested or shown and the common meaning is therefore presumed to be the same and controlling. *E. Dillingham, Inc.* v. *United States*, 30 Cust. Ct. 187, C.D. 1518 (1953), *aff'd*, 41 CCPA 221, C.A.D. 555 (1954); *Swan* v. *Arthur*, 103 U.S. 597 (1881) and *Trans-Atlantic Company* v. *United States*, 60 CCPA 100, C.A.D. 1088, 471 F. 2d 1397 (1973).

Plaintiff has cited and quoted from a number of textile and fabric dictionaries and authorities some of which describe "fishnet" as a material resembling "fishing nets."

It is obvious there is a difference between the common meaning evidenced by Webster's Dictionary and the various textile and fabric dictionaries cited by plaintiff. Plaintiff has not shown how widespread (in how many States) a different commercial designation is existent if that is plaintiff's contention. *John A. Steer Company* v. *United States*, 41 Cust. Ct. 156, C.D. 2034 (1958). The burden of proof of commercial designation, if different from the common meaning, must be shown by plaintiff, which has not been done. *Winsor & Newton, Inc.* v. *United States*, 6 Cust. Ct. 82, C.D. 432 (1941); *Border Brokerage Co. et al.* v. *United States*, 39 Cust. Ct. 179, C.D. 1923 (1957).

The record shows plaintiff produced four witnesses and defendant two witnesses.

As stated by plaintiff's witness Paul Fix, the imported merchandise is referred to as a "decorative fish net." He testified:

> * * * I refer to it to the customer as decorative fish net. They ask for fish netting or decorative fish netting, or whatever. And they will ask for something to put on their wall or ceiling, or have a bare space to fill up. I will show them how to fill it up. And we have the shells right there with it, and everything. So, we have a whole seashell section along with the netting. It's displayed with seashells (R. 21).

As to how the merchandise is sold, said witness, Mr. Fix responded:

> * * * We basically merchandise this on a just regular 4 x 8 fixture, and we merchandise it with a display on each end and, you know, a few starfish or shells or whatever displayed with it. And if a customer specifically asks for the use of it or whatnot, I will give them as much as I know how to use it. I have even used it in my own home (R. 20).

In response to the question: "Do you sell fish net or fish netting in your stores which to your knowledge is intended to be used in catching fish?" Mr. Fix responded:

> There has never been a customer that's come in to say "I want some fish netting to catch fish" * * * (R. 26).

Later, he added:

> It's my testimony that the majority of the people who come in and the majority of its uses are for decorative purposes on walls,

> ceiling, and wherever, and that as far as catching fish, no, not in my experience (R. 30).

Two of plaintiff's witnesses, Dr. Kaiser, an assistant professor at California State University, and Dr. Lare, a professor of home economics at California State University, testified respectively that the imported merchandise was fish netting and fish net.

Throughout the trial, this fact stood out: The merchandise is not used for fishing. One of defendant's witnesses, Mr. Borti Petrich, a self-employed net maker, testified:

> The strength of the material, it's just not heavy enough. For example, the size of the fish that you would catch in a mesh that big would be quite strong, and this is not capable of holding a fish that big for any length of time (R. 83).

There are other reasons the merchandise is not used for catching fish (R. 86–88).

In plaintiff's brief it is stated the testimony establishes that the subject merchandise (1) is purchased, sold, and advertised as "fishnet" or "fish netting," (2) is similar in its construction to "fishing net," but (3) is probably not sufficiently durable for use in catching fish.

It is of course unquestioned that the legislative history of a tariff provision is a basic consideration in the determination of the intent of Congress as to the scope of the tariff terms.

Defendant has cited and quoted from previous acts of Congress, to wit: Tariff Acts of 1894, 1897, 1909, 1913, 1922, 1930 and the Tariff Classification Act of 1962 as demonstrating a congressional mandate that only commercial fishing nets and fish netting were encompassed in the TSUS provisions, items 355.35 through 355.45. Plaintiff has not refuted this contention of defendant.

The cases of *W. A. Augur, Inc.* v. *United States*, 7 Cust. Ct. 198, C.D. 567 (1941) and *Florida Fishermens Supply Co.* v. *United States*, 23 Cust. Ct. 204, Abs. 53713 (1949) are also interesting in interpreting the earlier statutes.

It is also well settled that the *Summaries of Trade and Tariff Information* are helpful in discerning the scope of TSUS item numbers. *The Englishtown Corporation* v. *United States*, 64 CCPA 84, C.A.D. 1187, 553 F. 2d 1258 (1977); *American Bristle & Hair Drawing Co. et al.* v. *United States*, 59 CCPA 104, C.A.D. 1048, 458 F. 2d 524 (1972); *J. E. Bernard Co.* v. *United States*, 81 Cust. Ct. 60, C.D. 4766 (1978).

With respect to item numbers 355.35 to 355.45, the *Summary of Trade and Tariff Information* (1969) states:

> Imports of fish netting and fishing nets, once very substantial, now have a smaller percentage of the market than formerly. The change in the share supplied by imports has accompanied a change in fishing methods and a shift from nets of vegetable fiber to nets of manmade fiber. [Schedule 3, vol. 4, p. 15.]

This statement implies that fish netting and fishing nets are both used for fishing.

The record in this case clearly establishes that the imported merchandise is merely decorative display netting which is not suitable for commercial fishing.

Based upon the statutory presumption of correctness (28 U.S.C. 2635) cited by defendant, it is obvious that plaintiff has failed to establish a *prima facie* case. *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970).

The plaintiff's action is dismissed.

(C.D. 4820)

ERIE NAVIGATION COMPANY, PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Remission of Duties—Ship Repairs

CUSTOMS: The cost of repairs made in a foreign port to the vessel at bar was assessed by tbe Customs Service under the provisions of section 1466(a) of title 19 U.S.C. Under that act, a repair duty is required to be levied upon a vessel documented under the laws of the United States engaged in foreign or coasting trade or a vessel intended to be employed in such trade.

CONSTITUTIONAL LAW: Any challenge to the constitutionality of a statute is confronted with the presumption that legislation duly enacted by Congress is constitutional. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S. Ct. 2882, 2892 1976).

CONSTITUTIONAL LAW: In a judicial determination whether a statute is unconstitutional as violative of the requirements of due process, the first question to be resolved is whether the purpose of the statute is a proper matter for the exercise of legislative power. *See Nebbia* v. *New York*, 291 U.S. 502, 54 S. Ct. 505 (1934).

CONSTITUTIONAL LAW: Where plaintiff chose between having vessel repairs completed in Canada and paying duty or having them completed in the United States and not paying the duty does not make the application of section 1466(a) so unreasonable as to constitute a violation of its alleged fifth amendment due process right.

Court No. 76-5-01081

[Judgment for defendant.]

Decided August 27, 1979

Scott H. Elder; Thompson, Hine and Flory of Counsel; for the plaintiff.

Alice Daniel, Acting Assistant Attorney General; *David M. Cohen*, Branch Director, Commercial Litigation Branch; *Joseph I. Liebman*, Attorney in Charge,

Field Office for Customs Litigation (*Jerry P. Wiskin* at the trial; *William F. Atkin, Glenn E. Harris* and *Jerry P. Wiskin* on the briefs), for the defendant.

RE, Chief Judge: Plaintiff, the owner and operator of the vessel MV *Day Peckinpaugh*, brought this action to recover Customs duties paid on repairs made to the vessel at a foreign port. The vessel, documented under the laws of the United States, was engaged in transporting bulk cement on Lake Ontario between the Canadian port of Picton, Ontario, and the American ports at Rome and Rochester, N.Y. In August 1973, the vessel was drydocked at Port Weller, Ontario, Canada, where the repairs were made.

Upon return to a U.S. port, duties were assessed on the cost of the foreign repairs pursuant to the provisions of section 1466 of title 19 of the United States Code. In pertinent part, section 1466(a) provides:

> The equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade, or a vessel intended to be employed in such trade, shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country * * *.

Subsection (b) of section 1466 provides for the remission or refund of duties paid for "necessary repairs" caused by "stress of weather or other casualty." See *Suwannee Steamship Company* v. *United States*, 435 F. Supp. 389, 79 Cust. Ct. 19 (1977). Plaintiff is not seeking a remission of duties under that subsection, but rather claims that section 1466(a), under which the duties were assessed, is unconstitutional.

Plaintiff does not dispute the amount of duties paid, but claims that they should not have been assessed under the special circumstances presented. Specifically, it contends that, on the facts of this case, section 1466(a) is unconstitutional, and that the assessment of duties is arbitrary and capricious.

The vessel, by its certificate of inspection issued by the U.S. Coast Guard, is limited to operations on Lake Ontario and the New York State Barge Canal. Plaintiff alleges that on the American side of Lake Ontario, or the New York State Barge Canal, there are no ports with drydock facilities which could accommodate the vessel. Facilities are available at Port Weller, Ontario, Canada. In order to renew the required certificate of inspection, the vessel must undergo an "inspection, site, and survey" every 5 years at a drydock facility. The drydocking, at the Canadian port in August 1973, was for the purpose of complying with this requirement.

Since there was no drydock facility at an American port on Lake Ontario, or the New York State Barge Canal, and since the vessel was allegedly limited by its certificate of inspection, plaintiff asserts that it could not comply with the 5-year drydocking requirement at an American port. Consequently, drydocking of the vessel at the Canadian port was compelled by force of law.

Furthermore, plaintiff asserts that, even if the vessel was authorized to proceed to an American drydock, the cost of the trip would have added an unreasonable economic burden that served no useful purpose.

Plaintiff's contention that, in this case, the application of the statute was arbitrary and capricious is essentially threefold. First, plaintiff argues that it was impossible for the vessel to reach an American drydock because of its restriction to Lake Ontario and the New York State Barge Canal in its certificate of inspection. Second, it states that, since there are no drydocks on the American side of Lake Ontario and on the New York State Barge Canal to accommodate the vessel, the assessment of duty upon the repairs done in Canada bears no reasonable relationship to the legislative purpose of section 1466(a) to protect the American shipbuilding industry. Finally, plaintiff submits that the expense of proceeding to an American port for the required repairs would be so burdensome as to render the application of the statute unconstitutional.

Plaintiff can only succeed on its constitutional challenge by rebutting the strong presumption that legislation duly enacted by Congress is constitutional. As stated in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S. Ct. 2882, 2892 (1976):

> It is by now well established that legislative acts adjusting the burdens and benefits of economic life come to the court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. See, e.g., *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 487–488 (1955).

A corollary to that basic presumption of constitutionality,

> * * * is the principle that, when one interpretation of a statute would create a substantial doubt as to the statute's constitutional validity, the courts will avoid that interpretation absent a "clear statement" of a contrary legislative intent. When a statute is fairly subject to a variety of interpretations all but one of which would make it unconstitutional, then the courts must presume Congress intended the interpretation which is constitutionally permissible. See, e.g., *United States* v. *Rumely*, 345 U.S. 41, 45, 73 S. Ct. 543, 97 L. Ed. 770 (1953); *Gutknecht* v. *United States*, 396 U.S. 295, 90 S. Ct. 506, 24 L. Ed. 2d 532 (1970). *United States* v. *Thompson*, 452 F. 2d 1333, 1337 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 998 (1972).

Since plaintiff challenges the application of section 1466 to this particular case, it must produce "facts essential to a determination respecting the constitutional claim." *United States* v. *Canty*, 469 F. 2d 114, 121 (D.C. Cir. 1972). Plaintiff's failure at the trial to prove its factual allegations compels the conclusion that it did not sustain its burden of proof.

Plaintiff asserts that, because the vessel's certificate of inspection restricted its operations to Lake Ontario and the New York State Barge Canal, it was impossible for it to reach an American drydock. Defendant's witness, Comdr. Daniel Mania, U.S. Coast Guard, however, testified that plaintiff could have applied for an amendment to the certificate of inspection. The amendment would have permitted the vessel to sail outside of Lake Ontario, or the New York State Barge Canal, to a repair facility at the American port in Lorain, Ohio, or Staten Island, N.Y. Commander Mania also testified that there was no record that the plaintiff had made such an application. Clearly, plaintiff failed to establish that its vessel could not proceed to an American drydock facility through the New York State Barge Canal; e.g., the one located at Staten Island, N.Y.

In its complaint, plaintiff alleged that the cost of reaching an American drydock facility required an "additional expenditure in excess of $12,000." At trial, however, it introduced no evidence to show the cost of the trip to an American drydock facility. Plaintiff clearly failed to prove its allegation of "additional expenditure."

Crucial to plaintiff's constitutional arguments are its contentions as to the limitation of its operating certificate for repairs outside of Lake Ontario and the New York State Barge Canal, and the excessive cost of such a trip even if authorized. The record does not sustain plaintiff's allegations, nor does it support a finding that the assessed repairs could only have been performed in a foreign shipyard.

Notwithstanding plaintiff's deficiencies of proof, it nevertheless persistently urges this court to hold that section 1466(a) is unconstitutional as applied to the facts of this case. It is the opinion of this court that, even if plaintiff had proven its factual allegations it has not demonstrated that section 1466(a) is an unconstitutional exercise of the legislative power of the Congress.

Whether a statute is unconstitutional, as a violation of plaintiff's fifth amendment right to due process, depends initially upon whether it is a proper subject matter for the exercise of the legislative power. *See Nebbia* v. *New York*, 291 U.S. 502, 54 S. Ct. 505 (1934). It must also be determined whether the method selected has a rational relation to the purpose sought to be attained by the statute. Id. at 525. It has been stated that as long as "any state of facts either known or which could reasonably be assumed" supports the judgment of Congress, a

rational relationship is deemed to exist. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 154, 58 S. Ct. 778, 784 (1938).

It is clear that the purpose of section 1466(a) was to protect the American shipbuilding and repairing industry. *United States* v. *Gissel*, 353 F. Supp. 768, 772 (S.D. Tex. 1973), *aff'd*, 493 F. 2d 27 (5th Cir. 1974). In addition to noting the Congressional purpose of the statute, in *Suwannee Steamship Company* v. *United States*, 79 Cust. Ct. 19, 26, C.D. 4708, 435 F. Supp. 389, 394 (1977), this court stated that:

> Both the hearings of the Senate committee, and the committee's final report on section 466, evidence the concern of the committee members that the House amendment would have provided insufficient protection for American shipyards, the class for whose benefit the section was originally formulated. *See Senate Hearings* on H.R. 2667, 71st Cong., 1st session, volume XVII at 537–46 (1929) * * * S. Rept. No. 37, 71st Cong., 1st sess., 72 (1929).

The Supreme Court of the United States, in *Hampton & Co.* v. *United States*, 276 U.S. 394, 412, 48 S. Ct. 348, 353 (1928), held that the protection of American industry, through the levy of Customs duties, is permissible subject matter for the exercise of the legislative power. In *Hampton*, the basic issue was the validity of the assessment of additional duties on certain imports pursuant to the "flexible tariff" provision of title III of the Tariff Act of 1922, 42 Stat. 934 (1922). The "flexible tariff" provision was challenged on two grounds: First, that it was an illegal delegation of legislative power to the President; second, that the object of the statute, the protection of American industry, was impermissible. The Court held that the protection of American industry, through the levy of Customs duties, was a permissible exercise of legislative power which had a history dating back to the second act of Congress in 1789. Id. at 412. It also found that the "flexible tariff" provision was not an illegal delegation of legislative power to the President since the statute prescribed "intelligible" principles for the exercise of the discretion delegated to the President. Id. at 409. Since the *Hampton* case teaches that the protection of American industry, through the levy of Customs duties, is a permissible legislative object, section 1466(a) cannot be considered constitutionally infirm as an inappropriate exercise of the legislative power.

Citing the *Nebbia* case, the plaintiff stresses that the guaranty of due process "demands that the means selected (in this case the imposition of duties) must have a real and substantial relation to the object sought to be attained." Specifically, plaintiff complains that the assessment of duties on the repairs bears no rational relation to the object of the statute, because there are no drydocks on the American side of Lake Ontario or on the New York State Barge Canal where the repairs could have been performed. This assertion is unsupportable since there are American drydock facilities at Lorain,

Ohio, Staten Island, N.Y., and other locations in the Great Lakes region. Pursuant to the statutory purpose, their interests are protected by the assessment made upon the foreign repairs.

The imposition of duties upon foreign ship repairs, as intended by the statute, increases the cost of the foreign repairs. The assessment, therefore, serves as a negative incentive, and is intended to induce a shipowner to choose a U.S. facility for repairs. Plaintiff has not demonstrated that the statute bears no rational relation to the object sought to be attained, namely, affording protection to the American shipbuilding industry. The fact that plaintiff chose a course of action which required an assessment of duties does not make the application of section 1466(a) so unreasonable as to constitute a violation of its alleged fifth amendment due process rights.

Had plaintiff proven that it was impossible for its vessel, under its certificate of inspection, to reach an American drydock facility for the required inspection, the question would then be presented as to the reasonableness of the statute as applied to the particular case. On this record, plaintiff did not prove that it was impossible for its vessel to leave Lake Ontario in order to reach an American drydock for the required inspection and repairs.

It is fundamental in our constitutional system that the judicial power extends to "cases" and "controversies" properly presented for adjudication. U.S. Constitution, article III, section 2. *See Flast* v. *Cohen*, 392 U.S. 83, 94–95, 88 S. Ct. 1942, 1949–1950 (1968). In *United States* v. *Raines*, 362 U.S. 17, 20–21, 80 S. Ct. 519, 522 (1960), the Supreme Court noted that:

> The very foundation of the power of the Federal courts to declare acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. This was made patent in the first case here exercising that power—"the gravest and most delicate duty that this Court is called on to perform." *Marbury* v. *Madison*, 1 Cranch 137, 177–180. This Court, as is the case with all Federal courts, "has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39.

Plaintiff vigorously maintains that the statute compels it to choose between two cost-burdensome alternatives; namely, to pay the duties assessed on the foreign repairs, or to proceed to an American drydock

to comply with the inspection/certification requirement. It is implicit in plaintiff's argument that it has the option to choose where the repairs will be made. It cannot complain that, as a consequence of its choice, the statute imposes a monetary burden. *See City of Pittsburgh* v. *Alco Parking Corp. et al.*, 417 U.S. 369, 94 S. Ct. 2291 (1974). *See also, Alaska Fish Salting & By-Products Co.* v. *Smith*, 255 U.S. 44, 41 S. Ct. 219 (1921); *A. Magnano Co.* v. *Hamilton*, 292 U.S. 40, 54 S. Ct. 599 (1934).

Plaintiff's argument that section 1466(a) imposes a monetary burden upon its business does not present an issue of constitutional magnitude.

It is the determination of the court that plaintiff has neither proven its factual allegations, nor established that section 1466(a) is unconstitutional as applied. Plaintiff's action is dismissed.

Judgment will be entered accordingly.

(C.D. 4821)

ATKINS KROLL & CO., LTD.,* PLAINTIFF *v.* UNITED STATES, DEFENDANT

Steel products (bars and bars-shapes)

Abandonment Of Sole Issue—Revival Of Abandoned Issues—Dismissal Of Action

When issues in an action challenging administrative antidumping determinations are in effect reduced to a single less than fair value issue at the trial and the action submitted by the importer for decision upon a portion of the administrative record, *Held*, the importer will not be permitted to resurrect issues it expressly abandoned at the trial, and its abandonment of the sole issue tendered for trial necessitates dismissal of the action for failure of proof—the *regularity* of the challenged determinations being presumed in the absence of evidence to the contrary.

Consolidated Court No. R65/10806

[Dismissed.]

Decided September 10, 1979

Glad, Tuttle & White (*Steven W. Baker* at the trial; *George R. Tuttle* on the briefs) for the plaintiff.

Alice Daniel, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch (*Velta A. Melnbrencis* at the trial and on the brief), for the defendant.

*Also referred to as Atkins Kroll & Co., Inc. by the parties.

RICHARDSON, Judge: The merchandise in this consolidated action consists of carbon steel bars and bars-shapes manufactured in and exported from Canada between August 1963, and March 1964, and appraised upon entry at Sumas, Wash., on the basis of export value as defined in 19 U.S.C.A., section 1401a(b) (sec. 402(b), Tariff Act of 1930, as amended), as determined in accordance with 19 U.S.C.A, section 160, et seq. (sec. 201, et seq., Antidumping Act of 1921, as amended). The issue in the case relates to the imposition of dumping duties, no question having been presented concerning the underlying appraisement of the merchandise.

The record shows that on May 28, 1964, the Secretary of the Treasury determined, pursuant to proceedings instituted under the Antidumping Act, that carbon steel bars, bars-shapes under 3 inches, and structural shapes 3 inches and over, manufactured by Western Canada Steel Ltd. and/or its subsidiary, Vancouver Rolling Mills Ltd. of Vancouver, Canada, were being, or were likely to be, sold at less than fair value (LTFV) within the meaning of section 160(a) (29 Fed. Reg. 7294, exhibit 2), and advised the U.S. Tariff Commission (Commission) accordingly; that on September 1, 1964, the Commission determined that an industry in the United States was being injured by reason of the importation into the United States of carbon steel bars, bars-shapes under 3 inches, and structural shapes 3 inches and over, manufactured by Western Canada Steel Ltd. and/or its subsidiary, Vancouver Rolling Mills Ltd. of Vancouver, Canada, and sold at LTFV within the meaning of the Antidumping Act (29 Fed. Reg. 12599, exhibit 4); and that on September 25, 1964, a "finding of dumping" was published pursuant to section 160(a) on behalf of the Secretary of the Treasury (29 Fed. Reg. 13319, exhibit 5).

The present action results from an adverse determination rendered by the appropriate customs official against plaintiff's administrative reappraisement appeals filed subsequent to appraisement of the involved merchandise "subject to dumping" as mandated by the dumping finding. Issue was raised under the pleadings both as to the Secretary's LTFV determination and as to the Commission's injury determination on a number of grounds. However, at the trial plaintiff abandoned all but one of its contentions directed to the Secretary's LTFV determination; and, as to this phase of the case, elected to submit its case against the Secretary's LTFV determination on the basis of a portion of the administrative record on the sole issue under 19 CFR, section 14.7(b)(8) as to whether the quantity of merchandise involved in sales to the United States was more than insignificant (so as to abort a LTFV determination).

At the trial plaintiff did not explicitly address itself to the remaining pleading issues relating to the Commission's injury determination.

Neither has it done so in its brief filed subsequent to trial. And the record before the court as to this phase of the case consists only of a transcript of oral testimony (exhibit 3) given at a public hearing held before the Commission on July 27, 1964, that does not include exhibits placed in evidence there, as well as the Commission's determination of injury with accompanying statements of supporting and dissenting views of the commissioners (exhibit 4). A tedious reading of the substantially illegible 198-page hearing transcript discloses a subject matter content not as inclusive as that embraced by and dealt with in the written views of the commissioners accompanying the injury determination.

With respect to plaintiff's brief, it is to be noted that it does not address itself to the LTFV quantity issue asserted at the trial under 19 CFR, section 14.7(b)(8) as expected. Instead, plaintiff's brief deals exclusively with LTFV issues which plaintiff expressly abandoned at the trial. Counsel undertakes to justify this reversal of posture by asserting that counsel had never announced his intention to abandon these LTFV issues (reply brief, p. 2).

Such an assertion finds no support in the record. The record shows that with respect to these LTFV issues plaintiff's counsel responded to the court's prompting by stating (R. 3):

> Mr. BAKER. This is a separate Complaint, your Honor. *The abandonment of these issues does parallel precisely those of the other case.* They are the same paragraph allegations made in the Atkins Kroll Complaint as was made in the Border Brokerage Complaint. [Italic added.]

There simply isn't any room for a construction of counsel's statement as meaning anything other than the abandonment of these LTFV issues in conformity to the posture counsel had earlier taken in abandoning identical issues in the companion case entitled *Border Brokerage Co., Inc.* v. *United States*, Consolidated Court No. R65/10840–12206, the trial of which immediately preceded trial in the instant case following an unsuccessful attempt on counsel's part to consolidate the two cases. And counsel's subsequent posture in argument before the court in this case is consistent with the abandonment of all LTFV issues except the issue of quantity as framed in paragraph 11 of the complaint under the court's ruling in *Border Brokerage* as to the scope of the *de minimis* issue (R. 5–6).

What the case comes down to, then, is plaintiff's abandonment and failure to follow through on the sole LTFV issue it presented to the court, and its abandonment both by deed as well as by words of the remaining issues in the case dealing with the LTFV and injury determinations, the *regularity* of which determinations are presumed in the absence of evidence to the contrary. See *Norwegian*

Nitrogen Products Co. v. *United States*, 20 CCPA 27, 38, T.D. 45674 (1932), *aff'd*, 288 U.S. 294 (1933). Consequently, on this record the court fully agrees with defendant that the questions raised in plaintiff's 126-page brief are not properly before the court for determination. *Cf. Charberjoy Distributors, Inc.* v. *United States*, 65 Cust. Ct. 459, 462, C.D. 4123 (1970), *aff'd on other grounds*, 59 CCPA 207, C.A.D. 1068, 465 F. 2d 922 (1972). And, in view of the 14-year lifespan of the instant case in which plaintiff has been afforded ample opportunity to develop a plenary record for meaningful judicial review of the challenged administrative determinations, the court is constrained to and does dismiss this action for failure of proof.

Judgment will be entered herein accordingly.

C.D. 4822

GENERAL ELECTRIC COMPANY, PLAINTIFF *v.* UNITED STATES, DEFENDANT

On Defendant's Motion and Plaintiff's Cross-Motion for Summary Judgment

Court No. 75–5–01117

[Motion granted; cross-motion denied.]

Dated September 11, 1979

Freeman, Meade, Wassermen & Schneider, Esqs. (*Louis Schneider, Herbert Peter Larsen* and *Bryce MacDonald*, Esqs., of counsel) for the plaintiff.

Alice Daniel, Acting Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation, Esqs., for the defendant.

NEWMAN, Judge: Plaintiff challenges the customs classification of certain solid-state (tubeless) clock-radios (models C4305 and C4335A) exported from Taiwan and entered at the ports of Spokane, Wash. and Seattle-Tacoma Airport, Wash. in 1971. The parties agree there is no justiciable issue as to any material fact, and have cross-moved for summary judgment pursuant to rule 8.2(a) of this court. In support of their respective motions, the parties have submitted memoranda and various documentary exhibits.

Plainly, then, this is the classic instance for a constructive utilization of the summary judgment route, thereby obviating the necessity of a trial in reaching a prompt disposition of the issues.

It appears that the district director of customs classified the merchandise under the provision in item 685.23, TSUS, as modified

by T.D. 68–9, for solid-state (tubeless) radio receivers, and assessed duty at the rate of 10.4 per centum ad valorem. Additionally, pursuant to schedule 7, part 2, subpart E, headnote 5, the clock movements were constructively separated from the remainder of the merchandise and separately assessed with duty at the rate of 45 cents per clock, the rate applicable to item 720.02, TSUS, as modified by T.D. 68–9.

Plaintiff claims that the proper classification for the clock-radios is under the provision for "Other" in item 685.50, TSUS, as modified by T.D. 68–9, with duty either at the rate of 9 per centum ad valorem, or alternatively under the provision for "other" in item 685.25,TSUS, as modified by T.D. 68–9, with duty at the rate of 7 per centum ad valorem.[1]

For the reasons indicated hereinafter, defendant's motion is granted; plaintiff's cross-motion is denied.

Statutes Involved

Items 685.23, 685.25 and 685.50 of the Tariff Schedules of the United States, as modified by Presidential Proclamation 3822, T.D. 68–9, read:

	Radiotelegraphic and radiotelephonic transmission and reception apparatus; radiobroadcasting and television transmission and reception apparatus, and television cameras; record players, phonographs, tape recorders, dictation recording and transcribing machines, record changers, and tone arms; all of the foregoing, and any combination thereof, whether or not incorporating clocks or other timing apparatus, and parts thereof:	
	* * * * * * *	
	Radiotelegraphic and radiotelephonic transmission and reception apparatus; radiobroadcasting and television transmission and reception apparatus, and parts thereof:	
	* * * * * * * *	
	Other:	
685.23	Solid-state (tubeless) radio receivers	10.4% ad val.
685.25	Other	7% ad val.
	* * * * * * *	

[1] In its complaint (para. 10), plaintiff contests the separate assessment of duties on the clock movements pursuant to headnote 5, schedule 7, part 2E, but in its reply brief, p. 30, plaintiff states that it is not challenging the separate assessment at this time. Accordingly, that claim is dismissed.

316-021 O - 80 - 5

Other:

* * * * * * *

685.50 Other ..... 9% ad val.

Headnote 5 of schedule 7, part 2, subpart E, TSUS, so far as pertinent provides:

> 5. *Combination articles containing watch or clock movements.*—A watch or clock movement (and its dial, if any) in a combination article is classifiable under the provision applicable to such combination article, but, in determining the duties on the combination article, the movement (and its dial, if any) shall be constructively separated therefrom and assessed with the same rate as would have applied if it had been imported separately. * * *

OPINION

I

There is no dispute that the imports herein comprise solid-state (tubeless) clock-radios. In light of the Government's classification of the merchandise under item 685.23 and plaintiff's alternative claims under items 685.50 and 685.25, the identical issue presented in *Montgomery Ward & Co., Inc.* v. *United States*, 74 Cust. Ct. 125, C.D. 4596 (1975) is again before us.[2]

In *Montgomery Ward*, it was held that the provision in item 685.23 for solid-state (tubeless) radio receivers was qualified by the "whether or not" phrase in the superior heading, thus effectuating the clearly manifested congressional intent to make the presence or absence of a clock or other timing apparatus irrelevant to the classification of the merchandise embraced by the superior heading and inferior indented subheadings. Consequently, I concluded that the solid-state clock-radios in *Montgomery Ward* were properly classified by the Government under item 685.23, and in that connection, commented (74 Cust. Ct. at 130):

> I agree with defendant's position. It is difficult to conceive how Congress could better have expressed its intent that the "whether or not" phrase shall modify or qualify each and every article description subordinate to the superior heading than by utilizing the all-inclusive antecedent language "all of the foregoing, and any combination thereof". Thus, item 685.23 must be construed as if the "whether or not" phrase had been actually engrafted on that provision, to wit: "Solid-state (tubeless) radio receivers, whether or not incorporating clocks or other timing apparatus".[2]

[2] Similarly, item 685.30, in effect, provides: "Radio-phonograph combinations, whether or not incorporating clocks or other timing apparatus". *Cf. Velan Steam Spec. & Velan Valve Corp.* v. *United States*, 57 CCPA 58, C.A.D. 976, 420 F. 2d 1399 (1970) (parts

[1] However, in *Montgomery Ward*, plaintiff's primary claim was item 685.25, and its alternative claim was 685.50.

provision in superior heading read into subordinate article description wherein parts were not expressly mentioned).

Predicated upon the *Tariff Classification Study Explanatory and Background Materials* (November 15, 1960), schedule 6, part 5, page 305, and the language of the superior heading, I also determined in *Montgomery Ward* that the combination articles covered by item 685.50 (Montgomery Ward's alternative claim) are not those created by incorporating a clock or other timing apparatus in another article (viz, a radio), but rather are those created by a combination of some of the articles mentioned in the superior heading antecedent to the phrase "and any combination *thereof*", whether or not incorporating a clock or other timing apparatus". (Italic added.) Thus, in *Montgomery Ward*, it was observed (74 Cust. Ct. at 133–34):

> However, if extrinsic aids of construction, such as legislative history, are warranted, I believe the following significant comment in the *Tariff Classification Study Explanatory and Background Materials* (November 15, 1960), schedule 6, part 5, page 305,[4] indicates the scope of item 685.50 intended by its framers:
>
> > Item 685.10 covers television cameras * * *. Item 685.20 covers radio telegraphic and radio telephonic transmission and reception apparatus and radio broadcasting and television transmission and reception apparatus. * * * Item 685.30 covers record players, phonographs, radio-phonograph combinations, record changers, turn-tables and tone arms. * * * Item 685.40 covers tape recorders and dictation recording and transcribing machines * * *. Item 685.50 covers certain *combinations of some of the articles previously mentioned* * * *. [Italic added.]
>
> Upon analysis of the foregoing comment, it is apparent that the phrase "combinations of some of the articles previously mentioned" refers to those combination articles embraced by the language in the superior heading "any combination thereof". The word "thereof" obviously refers to the articles previously enumerated in the superior heading. Therefore, while clock-radios are within the scope of headnote 5 of schedule 7, part 2E, nevertheless the combination articles covered by item 685.50 are not those created by incorporating a clock or other timing apparatus in an article. Rather, the combination articles within the scope of item 685.50 are those created by a combination of some of the articles mentioned in the heading *antecedent* to the phrase "and any combination thereof, *whether or not* incorporating clocks or other timing apparatus". [Italic added.] [Footnote 4 omitted.]

2

The thrust of the Government's position is that *Montgomery Ward* is *stare decisis* in the present case since plaintiff has not shown that decision to be erroneous. Plaintiff, however, insists that the *Montgomery Ward* decision is incorrect for the reasons discussed *infra*, and therefore should not be followed. In essence, plaintiff posits that the

"whether or not" phrase in the superior heading is not applicable to item 685.23 because such phrase is not repeated in that item after the *eo nomine* provision for "Solid-state (tubeless) radio receivers"; and that a radio incorporating a clock is a "combination article" classifiable only under the residual provision "Other" in item 685.50.

3

Fundamentally, unless shown to be erroneous, a prior decision should be regarded as *stare decisis* in a subsequent case involving the same merchandise and legal issues. See *United States* v. *L. Batlin & Son, Inc.*, 61 CCPA 17, 19, C.A.D. 1111, 487 F. 2d. 916 (1973); *United States* v. *Dodge & Olcott, Inc.*, 47 CCPA 100, 102–3, C.A.D. 737 (1960); *United States* v. *Mercantil Distribuidora, S.A., et al.*, 45 CCPA 20, 23–24, C.A.D. 667 (1957). See also an article authored by Chief Judge Re, "Stare Decisis", presented at a Seminar for Federal Appellate Judges, 79 F.R.D. 509 (1979).

Plaintiff maintains that *Montgomery Ward* has been implicitly overruled by the recent decision of the Court of Customs and Patent Appeals in *United States* v. *Paul M. W. Bruckmann*, 65 CCPA 90, C.A.D. 1211, 582 F. 2d 622 (1978). There, the dispute was whether certain "lamp parts" were classifiable under the *eo nomine* provision for incandescent lamps in item 653.30, TSUS, or under the residual item 653.39 ("Other"). The superior heading preceding item 653.30 covers certain articles and *parts*, but the indented subheading, item 653.30, does not expressly include parts. The question for determination was whether item 685.30 should be construed to include parts. In holding that the *eo nomine* subheading item 653.30 does not include parts, Judge Baldwin, writing for a majority of the Court, relied upon the well-settled rule that an *eo nomine* provision that does not specifically provide for parts does not include parts.

Bruckmann distinguished *Velan Steam Spec. & Velan Valve Corp.* v. *United States*, 57 CCPA 58, C.A.D. 976, 420 F. 2d 1399 (1970), wherein the Court of Customs and Patent Appeals held that a parts provision in a superior heading could be read into a subheading not explicitly covering parts. In *Bruckmann*, however, Judge Baldwin noted that the subheading involved in *Velan* was "adjectival" rather than *eo nomine* in form, meaning that the subheading contained no noun, but merely qualified the noun or nouns contained in the superior heading. Hence, *Bruckmann* rejected the *Velan* rationale respecting subheadings of the *eo nomine* type.

In its brief, plaintiff correctly points out that item 685.23 is an *eo nomine* provision,[3] but erroneously asserts that the *Montgomery Ward* decision "relied" upon *Velan*. On this score, plaintiff has failed

[3] "An *eo nomine* provision is one which names a specific product or describes a commodity by a specific name". *Traversi Laboratories, Inc.* v. *United States*, 83 Cust. Ct. 1, C.D. 4812 (1979).

to note that in *Montgomery Ward* the *Velan* case was cited in a *footnote* (74 Cust. Ct. at 130, n. 2) solely for *comparison*, as evidenced by the preceding signal "*Cf.*"

Indeed, *Bruckmann* is readily distinguishable from the present case. *Bruckmann* was concerned with a provision for *parts*, and the linchpin of the decision was the well-established rule that an *eo nomine* provision does not include parts unless expressly so mentioned. Clearly, that rule has no application in the present case. I know of no general rule that *eo nomine* provisions are not subject to the qualification of a "whether or not" phrase. The legislative intent to be inferred from that phrase in a superior heading is quite different from a provision for parts.

A "parts" provision in a superior heading is merely a merchandise description, whereas a "whether or not" phrase is essentially qualifying language. In the context of the superior heading before us, such qualifying language is implicitly invasive of all the subordinate indented provisions by virtue of the immediately antecedent language "*all* of the foregoing, and any combination *thereof*" (italic added).[4] As I stated in *Montgomery Ward* (74 Cust. Ct. at 132):

> If the "whether or not" phrase had been intended to be applicable solely to item 685.50, surely the phrase would not have been included in the superior heading and preface with the broad inclusive language "all of the foregoing, and any combination thereof", which language plainly is applicable to all the merchandise descriptions subordinate to the superior heading (items 685.10 through 685.50). In short, this clear statutory directive must be deemed dispositive of the legislative intent. * * *

Since the "whether or not" language as used in the context of the superior heading to items 685.10–685.50 is qualifying language and implicitly invasive, it is immaterial whether subheading 685.23 is of the *eo nomine* or adjectival type. Moreover, the invasive character of the "whether or not" language in the superior heading would make recitation of such language in each of the indented subheadings redundant.

To sum up, the "whether or not" language in the superior heading before us is distinguishable in principle from the parts provision in the superior heading in *Bruckmann* and consequently *Bruckmann* does not overrule *Montgomery Ward*.

4

Plaintiff also maintains that the documentary materials submitted in support of its cross-motion establish an intent by the trade negotiators to exclude clock-radios from the scope of item 685.23. In *Montgomery Ward*, no such intent was demonstrated.

---

[4] Subordinate indented provisions are, of course, breakouts of the merchandise described in the preceding superior heading for the purpose of applying individual rates of duty and statistical annotations. See *Tariff Classification Study Submitting Report* (Nov. 15, 1960), pp. 9-10.

According to plaintiff, documents received from the State Department show that the negotiators were concerned with solid-state radios distinguished by their miniaturization and portability, and that item 685.23 was intended to be limited to such portable radios. Plaintiff asserts that since portability is not a feature of clock-radios, they are not within the intended scope of item 685.23. Although the documents submitted by plaintiff make reference to portability as one of the hallmarks of solid-state circuitry, nowhere do the documents evince any intent by the negotiators to limit item 685.23 to portable radios or to exclude clock-radios.

Significantly, exhibit H in plaintiff's submissions reviews the history of the statistical breakout provisions for radio receivers, and shows that effective January 1, 1970, the 484(e) Committee for the Statistical Annotation of the Tariff Schedules inserted under item 685.23 a statistical annotation for clock-radios as item 685.2330. Thereafter, new clock-movement statistical annotations were provided in the schedules to reflect variations in the type of radio (AM or other) and the type of timer (digital or other).

5

Plaintiff further argues that item 685.23 is not qualified by the "whether or not" phrase in its superior heading because that item was inserted into the tariff schedules as a new *eo nomine* provision. This contention is without merit. Item 685.23 was inserted in the schedules as a breakout of the radio reception apparatus provision covering all radio receivers (solid-state and otherwise), which provision is expressly qualified by the "whether or not" language in the superior heading. It must be assumed that had any exception to that language been intended, such exception would be reflected in the language of item 685.23. Defendant accurately points out that "whether or not" phrases in superior headings are commonplace in the tariff schedules, and many examples can be cited to demonstrate that exceptions to those phrases are expressly specified. See, e.g., items 110.15–110.36, item 111.64, items 140.60–140.75, items 170.20–170.46, items 352.10–352.80, items 609.80–609.86, items 647.01–647.10. Cf. items 119.50–119.70, items 141.05–141.55, items 165.15–165.70 wherein no exceptions are expressed.

6

Plaintiff additionally advances the argument that the statutory provisions involved in this case are ambiguous, and therefore congressional intent should be ascertained from "legislative history." On this aspect, plaintiff relies upon House Report No. 342 (May 12, 1965) accompanying H.R. 7969, the Tariff Schedules Technical Amendments Act of 1965 (Public Law 89–241). On page 37 of that report there

appears a parenthetical reference to clock-radios indicating that *in 1965* the Committee on Ways and Means understood that clock-radios were classifiable under item 685.50. In *Montgomery Ward*, the plaintiff relied upon this same report to support its alternative claim under item 685.50; but I did not find the parenthetical reference to clock-radios to be dispositive of congressional intent respecting the scope of item 685.50. Here, plaintiff characterizes the report as "crucial to the outcome of this case" (reply brief, at 6). Defendant points out that the parenthetical reference to clock-radios in House Report No. 342 is not part of the legislative history of item 685.50, but represents merely a comment on a *previously adopted* provision of the Tariff Schedules. Accordingly, defendant urges that the report not be relied upon as indicative of congressional intent to classify clock-radios under item 685.50.

I agree with defendant's position for the reasons previously expressed in *Montgomery Ward*, 74 Cust. Ct. at 132–33. And as aptly put by Judge Baldwin in *Costa International Corp.* v. *United States*, 58 CCPA 48, 53 C.A.D. 1003, 434 F. 2d 1053 (1970), the court "cannot permit the clear meaning of the statutory language to be overcome merely by showing of a possibly contrary legislative intent."

As observed in *Montgomery Ward*, if resort to extrinsic aids to construction is necessary in this case (and I think it is not necessary), the *Tariff Classification Study Explanatory and Background Materials* (November 15, 1960), schedule 6, part 5, page 305, reflect the intent of the drafters of the Tariff Schedules respecting the scope of item 685.50. 74 Cust. Ct. at 133. Inasmuch as the *Tariff Classification Study* was before Congress *prior* to the adoption of the schedules, obviously such study is a more reliable indication of congressional intent respecting the scope of item 685.50 than is the parenthetical comment in House Report No. 342.[5] *Cf. General Instrument Corp.* v. *United States*, 60 CCPA 178, 184, C.A.D. 1106, 480 F. 2d 1402 (1973).

Plaintiff insists that the Tariff Commission failed to describe the full scope of item 685.50 in the *Tariff Classification Study* (November 15, 1960), schedule 6, part 5, page 305, and the court must look also at the *Third Supplemental Report* of May 7, 1963, at page 58. I have carefully examined page 58 of the *Third Supplemental Report* (exhibit E(2) attached to plaintiff's brief), and suffice it to state I see nothing therein which supports plaintiff's claim that item 685.50 covers clock-radios.

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[5] Plaintiff erroneously states (brief, at 24) that H. Rept. No. 342 shows that originally the administrative practice under the TSUS was to classify clock-radios under item 685.50. However, the only Customs practice referred to in the report under sec. 53 is that of classifying the clock movement separately in par. 367(a) or 368(a) of the Tariff Act of 1930, and the rest of the combination article under par. 353.

7

Lastly, we consider plaintiff's contention that my decision in *Symphonic Electronics Corp.* v. *United States*, 77 Cust. Ct. 147, C.R.D. 76–5 (1976) indicates that a radio receiver cannot incorporate a clock without ceasing to be a radio receiver and becoming something more than a radio receiver.

In *Symphonic Electronics*, the sole issue was whether certain tuner amplifiers without a cabinet, loudspeaker, control knobs, or calibrated station dial were classifiable under item 685.23, TSUS. Cross-motions for summary judgment were denied for the reason that triable issues of fact existed concerning the essential components of a "radio receiver" as that term is commonly understood in the electronics industry, and whether tuner amplifiers of the type involved in the case were commonly regarded and sold in the trade as "radio receivers." The tuner amplifiers did not incorporate a clock, and no issue was presented concerning the applicability of the "whether or not" phrase in the superior heading to item 685.23. Hence, plaintiff's reliance on *Symphonic Electronics* is misplaced.

A radio receiver that incorporates a clock (viz, a clock-radio) is obviously more than a radio receiver. Nonetheless since item 685.23, as I interpret that provision, encompasses solid-state radio receivers, whether or not they incorporate a clock or other timing apparatus, there is no merit in plaintiff's contention that the "more than" doctrine excludes clock-radios from item 685.23. Moreover, the separate assessment of duties on the clock movements pursuant to headnote 5, schedule 7, part 2E is not inconsistent with the classification of the clock-radios under item 685.23, inasmuch as incorporation of a clock does not exclude solid-state (tubeless) radios from classification under item 685.23.

In summary, admittedly there is no genuine issue as to any material fact. I have carefully considered the new legal arguments presented by plaintiff, which were not raised or considered in *Montgomery Ward*, but the inescapable conclusion from the clear statutory language is that solid-state (tubeless) radio receivers are properly classifiable under item 685.23, "whether or not incorporating clocks, or other timing apparatus." To relegate the classification of solid-state (tubeless) radio receivers to residual item 685.50 because they incorporate a clock, as claimed by plaintiff, would frustrate the clear purpose of inserting the "whether or not" phrase in the superior heading.

For the reasons indicated, defendant's motion for summary judgment is granted; plaintiff's cross-motion for summary judgment is denied; and the action is hereby dismissed.

(C.D. 4823)

PASCO TERMINALS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

On Defendant's Motion and Plaintiff's Cross-Motion for Summary Judgment

Court No. 74–5–01357

[Defendant's motion granted; plaintiff's cross-motion denied.]

(Dated September 26, 1979)

Williams & Connolly (*J. Alan Galbraith* on the briefs) for the plaintiff.
Alice Daniel, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch (*Velta A. Melnbrencis*, Assistant Director, Commercial Litigation Branch, on the briefs), for the defendant.

MALETZ, Judge: This is an action to recover dumping duties that were assessed on four entries of crude or elemental sulphur which was exported from Mexico by the producer, Azufrera Panamericana, S.A. (Azufrera). Plaintiff, Pasco Terminals, Inc. (Pasco), was a wholly owned subsidary of Azufrera and paid the duties in question. [1] The case arises as follows:

On February 5, 1972, the Office of the Secretary of the Treasury published a determination that elemental sulphur from Mexico was being or was likely to be sold at less than fair value. Following this the U.S. Tariff Commission [2] instituted investigation No. AA1921–92 to determine whether an industry in the United States was being or was likely to be injured, or was prevented from being established, by reason of the importation of such merchandise into the United States. Notice of the investigation and hearing was published on February 12, 1972, and a public hearing was held March 28–30, 1972. Azufrera participated in this investigation and appeared at the public hearing. Pasco did not enter an appearance as an interested party.

Thereafter, the Tariff Commission unanimously determined that an industry in the United States was being injured by reason of imports from Mexico of sulphur sold or likely to be sold at less than fair value (LTFV).[3] On May 4, 1972, the Commission notified the Secretary of

[1] Previously, the Court of Customs and Patent Appeals held that Pasco had standing to maintain the action on the basis that it was agent for the contracting parties in respect of the four entries involved here and was therefore within the purview of sec. 514 of the Tariff Act of 1930, as amended (19 U.S.C. 1514 (1970)), which provides in part that "protests may be filed by the importer, consignee or any authorized *agent* of the person paying any charge or exaction * * *." (Italic added.) *Pasco Terminals, Inc.* v. *United States*, 65 CCPA 28, C.A.D. 1201, 567 F. 2d 976 (1977).

[2] The U.S. Tariff Commission was subsequently renamed the U.S. International Trade Commission by sec. 171(a) of the Trade Act of 1974 (19 U.S.C. 2231(a) (1976).)

[3] In making the determination, the Commission considered the industry to consist of those domestic facilities of U.S. producers devoted to the mining and recovery of sulphur. Sulphur mined by the Frasch hot water mining process (Frasch sulphur), the method used to produce the sulphur entered at LTFV from Mexico, was produced by 5 companies at 12 sites in the United States.

the Treasury of its determination of injury (in investigation No. AA1921–92) which was published in the Federal Register on May 10, 1972. See 37 F.R. 9417. Following this, on June 28, 1972, the Assistant Secretary of the Treasury published a finding of dumping with respect to sulphur exported from Mexico and subsequently the dumping duties in question were assessed and paid.

Plaintiff does not challenge the LTFV determination of the Secretary of the Treasury. Rather, it claims (1) that the Tariff Commission proceeding was procedurally defective in that (a) the Commission allegedly did not proceed in compliance with its own rules of practice and procedure; (b) the Commission violated fundamental due process rights in the conduct of its hearing; and (2) that the Commission determination of injury was arbitrary, capricious, an abuse of discretion, and not according to law.

Each of these contentions will be considered later. But before that, it is important as background to set forth (1) those facts developed before the Commission as to which there is no genuine issue; (2) a summary of the evidence in the public record before the Commission supportive of its injury determination; and (3) the specific findings of the Commission.

Facts Not in Dispute

We observe first that the following facts as developed before the Tariff Commission are not in real dispute:

1. During 1970–71, the Mexican elemental sulphur here in issue was sold in the United States at LTFV prices.

2. The demand for sulphur is very inelastic; i.e., unresponsive to changes in price in the short run.

3. Elemental sulphur is a fungible commodity; the one distinction is price.

4. Most sulphur in the United States is sold under sulphur purchase contracts which contain a "meet-or-release clause"; i.e., a provision which stipulates that if significant quantities of sulphur of a grade comparable to that being delivered by the supplier are offered to the purchaser at a price less than that being charged by the supplier, the supplier is obligated to either meet the lower price or to release that quantity of sulphur from the terms of the contract.

5. The U.S. Frasch sulphur producers during the relevant period were Freeport Minerals Co. (Freeport), Texas Gulf Sulphur Co. (TGS), Duval Corp. (Duval), Occidental Petroleum Corp., and Atlantic Richfield Co.

6. During all relevant times, the Mexican sulphur industry consisted of only two producers—Azufrera, which has dominated the industry for many years, with 70 to 85 percent of the total production, and Cia. Exploradora del Istmo, S.A. (CEDI).

7. Azufrera and CEDI are partly owned by the Mexican Government.

8. During all relevant times, Azufrera's export sales policies and prices were controlled by the Mexican Government.

9. Of the two Mexican producers, only Azufrera sells in the Tampa market. Mexican sulphur is not sold in the inland waterways and rail-truck markets (which would include markets in the North Central States). Logistical considerations have prevented imports from Canada from entering the Tampa market.

10. The Tampa market is different from any other sulphur market in the United States and possibly in the world because 25 percent of all sulphur consumed in the United States is consumed in that market; the market is highly concentrated; and access is principally by liquid sulphur tankers. The customers in that market are for the most part large-scale sulphur consumers; they are shrewd; they generally have more than one supplier; they play the field to obtain the best terms; they are in vigorous competition with each other; and their number is relatively small.

11. The east coast market is separate and distinct from the Tampa market except that price activity in one market has an impact on other market areas.

12. Major producers, such as Freeport and TGS, sell sulphur in both the east coast and the Tampa markets and in some instances to the same customers in both areas.

13. In the Tampa market, the shipments in long tons of sulphur from Tampa terminals of the sulphur producers to Tampa area customers were as follows:

	Azufrera	Freeport	TGS	Duval
1963	340, 161	408, 723	296, 704	----------
1964	390, 826	469, 805	385, 600	----------
1965	332, 487	727, 350	516, 960	----------
1966	223, 974	1, 242, 892	600, 420	----------
1967	131, 915	1, 318, 239	694, 425	----------
1968	135, 293	1, 237, 498	536, 264	----------
1969	11, 397	1, 219, 595	480, 996	35, 277
1970	130, 962	1, 123, 778	616, 446	238, 821
1971	119, 073	1, 134, 283	609, 858	350, 139
1972 [1]	829	201, 650	118, 676	66, 068

[1] For January and February only.

14. In late 1969, Duval opened its Culbertson mine in west Texas. It then became a significant factor in the Tampa and east coast markets.

15. During all relevant times, Duval's Culbertson mine was not producing at capacity. In 1972, it was producing about 1.4 million tons but had an estimated capacity of 2 million tons a year.

16. Prices in the Tampa market declined from about $45 per ton at the beginning of 1969 to about $25 per ton in 1971.

17. In 1969, when sulphur prices decreased rapidly, Azufrera shipped only 11,397 tons of sulphur in the Tampa area. Thus, in 1969, Azufrera was for all practical purposes out of the Tampa market.

18. Azufrera was out of the Tampa market in 1969 as a result of its decision, during a period of sulphur shortage in the years 1964 to 1968, to divert its sulphur to other markets where higher prices prevailed and not to renew existing contracts in the United States when they came up for renewal.

19. As a result of Azufrera's decision, during the period of sulphur shortage in the years 1964 to 1968, to divert its sulphur to other markets where higher prices prevailed, some of its existing customers in the United States were able to obtain only "prorated" amounts, while others were unable either to obtain any sulphur at all or were able to obtain sulphur only at prices higher than those which their competitors were paying for domestic supplies.

20. In 1970, Azufrera vigorously pursued sulphur contract negotiations with 10 U.S. purchasers. Six of these ten U.S. purchasers (C. F. Chemicals, Agrico Chemical Co., American Cyanamid, W. R. Grace & Co., USS Agri-Chemicals, and Standard Spray & Chemical Co.) were also customers of Freeport and most of these six were Azufrera customers in previous years.

21. In 1970, Azufrera reentered the Tampa sulphur market, increasing its sales in that market from 11,397 tons in 1969 to 130,962 tons. Of these 130,962 tons, 98,868 tons were sold to one customer, C. F. Chemicals.

22. The Tampa market increased by approximately 362,000 tons from 1969 to 1970 and by approximately 466,000 tons from 1969 to 1971.

23. In 1970, Duval increased its sales in the Tampa market by 203,000 tons over 1969. TGS increased its sales by 145,000 tons. Freeport lost 95,000 tons. Azufrera increased its sales by about 120,000 tons.

24. In 1971, Duval again made a strong gain, increasing its sales by 111,000 tons over 1970. Freeport, TGS, and Azufrera remained at essentially the same level as in 1970.

25. Sometime in 1971, Freeport lowered its price to $25 per ton.

26. The initiation of the antidumping investigation in 1971 had a strong deterrent effect on Azufrera's sales. On October 6, 1971, Azufrera notified all customers of a $3 per ton increase.

27. In February 1972, Freeport announced an increase in its offering price of $3 per ton. Duval and TGS followed suit. In March 1972, Freeport rescinded its announced price increase. Freeport satisfied itself that the "increase wasn't sticking." Azufrera was not selling in the Tampa market at that time.

28. As of the date of the Tariff Commission hearing in March 1972, some 9 Frasch mines out of a total of 21 had been shut down.

29. While each geographical sulphur market has its own price, a drastic price cut in one market has a "ripple" effect in another market, particularly when the two markets are nearby and the same producers and the same customers are involved.

30. A general reduction in the sulphur price at Tampa tends to bring down the sulphur price on the gulf coast and the east coast.

Evidence Before the Commission Supportive of Injury

In addition to these undisputed facts, there was evidence before the Commission supportive of injury. This evidence was that:

1. Azufrera was responsible for initiating price decreases in the Tampa market in these specific instances:

(a) In January 1970, when the prevailing price for sulphur was $32 per ton, Azufrera's sulphur was being offered for sale at $30 per ton f.o.b. to one of Freeport's major customers. As a result, Freeport reduced its price from $32 to $30 per ton.

(b) In March 1970, when the prevailing price for sulphur in Tampa was $30, Azufrera's sulphur was offered at $28 per ton to one of Freeport's major customers. As a result, Freeport lowered its price to that particular customer.

(c) In October 1970, when the prevailing price for sulphur was $30, Azufrera's sulphur was offered at $28 per ton to one of Freeport's major customers. As a result, Freeport reduced its price to all customers in the Tampa area from $30 to $27 per ton on November 1, 1970.

(d) In January 1971, Azufrera's sulphur was offered at $24 per ton to one of Freeport's major customers. In February 1971, Azufrera's sulphur was offered at $25 per ton to one of Freeport's major customers. As a result of these offers, on March 10, 1971, Freeport reduced its price to all customers in the Tampa area from $27 to $25 per ton.

2. Part of the responsibility for the $7 price reduction during 1970–71 was attributable to Azufrera.

3. In the absence of LTFV sales during 1970–71, there would not have been a drop of $7 per ton in the price of sulphur.

4. Commencing with January 1, 1971 (when the prevailing price for sulphur in Tampa was $27), Azufrera's sulphur was sold in the Tampa area to USS Agri-Chemicals (one of Freeport's customers) at $25 per ton.

5. During the period 1970–71, Freeport did not initiate any price decreases. It merely responded to price decreases initiated by suppliers of Mexican sulphur.

6. Duval was not responsible for initiating price cuts during 1970–71 as demonstrated by the following:

(a) Duval's policy was to be a major supplier over many years to come and in accordance with that policy, it developed a market strategy which concentrated its new business on growth and not in interrupting existing buyer-seller relationships.
(b) Duval concentrated on buyers who had open contracts or had contracts which were terminating.
(c) Duval had sold sulphur in the United States since 1920 and had relations with other buyers which opened doors.
(d) Duval had a corporate policy of never offering a price to a customer under contract whereby the customer could place his other suppliers in a "meet or release" situation.
(e) Although Duval had made some price reductions in 1969, beginning in 1970 and extending through the period in issue, Duval made no price offer at below the prevailing price.

7. Since 1968, with one exception in early 1969, TGS has never sold or offered to sell sulphur in the United States at less than the established competitive price.

8. As a result of the LTFV sales of Mexican sulphur:

(a) Duval's profitability declined generally in the 1970–71 period.
(b) Freeport lost gross sales revenue and had a lower profit margin on sales. (Freeport estimated that the reduction caused by the LTFV sales and offers cost it nearly $20 million in revenue.)

9. The sulphur price reduction in the Tampa area market caused by LTFV sales of Mexican sulphur had a "ripple" or "spillover" effect in the east coast market.

10. During the years 1970–71, neither Duval nor TGS had lost sales to any domestic company by virtue of the operation of the "meet or release" provisions of the existing contracts.

The Commission's Findings

Finally, it is to be noted that the Tariff Commission's determination of injury included the statement of reasons for the affirmative determination of Chairman Bedell and Commissioners Sutton and Moore[4] and the separate statement of reasons for the affirmative determination of Commissioners Leonard and Young. Both statements dealt with economic conditions in the domestic industry, extent of LTFV sales and offers, price depression, and market disruption.

[4] Vice Chairman Parker concurred in the result.

More specifically, on the basis of its investigation, the Tariff Commission found the following:

1. The domestic sulphur industry was beset by especially low prices which reflected a general world oversupply, which had increased from 16.4 million long tons in 1967 to 21.7 million long tons in 1970 and seemed destined to continue to increase. As a result, the market for sulphur was glutted and prospects were for still additional amounts to enter the market.

2. As a result of the oversupply of sulphur,[5] the Frasch sulphur producers, with large investment in the production of sulphur, had been forced to curtail exploration, shut down facilities, lay off workers, and had found their before-tax profits on sulphur operations substantially reduced.

3. Since the fall of 1968, sulphur prices had declined by about 50 percent in Tampa and along the western gulf and by about 40 percent along the east coast and in the North Central States.

4. Despite the wide uses of sulphur, there were only a small number of major buyers—nine sulfuric acid producers consumed at least 50 percent of the sulphur sold on the open market.

5. Sulphur was normally sold under tonnage contracts which required a seller to meet lower competitive offers or release that quantity from the terms of the contract.

6. In 1970, Mexican Frasch sulphur producers had begun to sell at LTFV.

7. Mexican home market sulphur sales were traditionally made at the maximum prices permitted by Mexican law, which had remained unchanged since 1955. Consequently, as the oversupply developed and the U.S. price deteriorated, imports of Mexican sulphur began to enter at LTFV. By the period 1970–71, virtually all sulphur from Mexico was entering the United States at LTFV margins ranging up to 40 percent of the adjusted home market price.

8. The sales and offers of Mexican sulphur at LTFV prices caused additional price deterioration in the Tampa market and on the east coast and added confusion and instability to the marketplace. These markets had been largely isolated from other foreign competition, although to some extent price activity in one domestic market area had an impact on prices in other domestic market areas.

9. LTFV sales and offers of Mexican sulphur had contributed to the general depression of prices and to market disruption in Tampa (the principal U.S. sulphur-consuming area) and along the east coast of the United States.

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[5] A large part of the increase was due to the recovery of sulphur from natural gas containing hydrogen sulfide and from refinery gas.

10. A part of the price depression undergone by the domestic industry since 1968 and part of the market disruption in Tampa could be directly tied to sales and offers of Mexican sulphur at LTFV.

11. When price sensitivity reached the degree which characterized the U.S. sulphur market in and since 1969, LTFV sales and offers would have almost inevitably caused an injuricus impact.

12. The sales and offers of LTFV sulphur from Mexico were sufficient factors contributing to price depression and market instability in the United States.

13. Injury (more than de minimis) resulted both from specific instances [6] where the LTFV margins permitted underselling which, in turn, precipitated general price reductions, and from the presence of additional supply in an already glutted market.

14. The injury to the domestic industry was especially serious occurring as it did while the industry was in a transitional state.

15. The injurious price depression from LTFV sales and offers did not end when domestic suppliers reestablished a price pattern based upon the unfair price. Since then, Mexican sulphur had continued to enter the U.S. market. The effect of these LTFV imports (even when made at prevailing prices) in an already oversupplied market resulted in further deterioration.

16. The fact that the domestic industry was facing difficulties caused by other factors did not obscure the significant link between the specific injury manifestations existing and threatened, and the LTFV imports.

Whether the Tariff Commission Proceeded in Compliance With Its Own Rules of Practice and Procedure

We come now to plaintiff's first contention that the Tariff Commission proceeding was procedurally defective in that the Commission assertedly failed to abide by its own confidential business data rule—rule 201.6 of the Commission's rules of practice and procedure which reads as follows:

> § 201.6 *Confidential business data.*
>
> (a) *Definition.*—Confidential business data consist of any information which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association, the disclosure of which is not authorized by law or by the party furnishing such information.

[6] These specific instances were noted by the Commission: (1) In the latter part of 1970, Mexican Frasch sulphur was sold at a price of $2 per ton below the price of domestic Frasch sulphur to an important Tampa customer. As a result, a few months later, its domestic supplier was obliged to meet the lower price: and (2) at about the same time, a large quantity of Mexican sulphur was offered to another large Tampa customer substantially below the price of domestic sulphur to the same buyer. The domestic supplier elected to meet the price. These sales and offers precipitated a general price reduction of $2 per ton. The Commission found that these instances of underselling could not have occurred if sales had been made at fair value.

(b) *Identification of information submitted in confidence.*—Business data which it is desired shall be treated as confidential shall be submitted on separate sheets each clearly marked at the top "Business confidential." When submitted at public hearings such business data shall be offered as a confidential exhibit with a brief description of the nature of the information.

(c) *Acceptance of information in confidence.*—The Commission may refuse to accept in confidence any information which it determines is not entitled to confidential treatment. In the event of such refusal, the person submitting such information will be notified thereof with a statement of the reasons and (if the information was submitted voluntarily) will be permitted to withdraw its tender.

In order fully to understand plaintiff's contention, some background is necessary. At the public hearing before the Commission, U.S. industry (principally Freeport) contended that Azufrera had depressed the price of sulphur through offers or sales that were under offers or sales then being made in the Tampa market. To support this contention, Freeport offered confidential exhibit 2, entitled "Tampa Price Chronology 1969–72." [7] This exhibit contained, among other things, the names of certain customers of Freeport who had furnished information to Freeport about offers allegedly made to them by competitors of Freeport. Freeport refused to disclose the names of these customers at the public hearing. Azufrera protested the use of this exhibit in confidence on the ground that if the exhibit were received, Azufrera should be allowed to inspect and use it in cross-examining Freeport's witnesses. The Commission overruled Azufrera's objection and received the exhibit in confidence.

It is to be added that the information that Freeport disclosed at the public hearing was considerably less detailed than that contained in exhibit 2 and that the Commission, in its injury determination, relied on Freeport's examples of offers assertedly made by Azufrera to customers of Freeport at prices below the then prevailing market price.

Against this background, plaintiff insists that confidential exhibit 2 is not within the class of documents which can be received in confidence under rule 201.6. The basis of this contention is that the exhibit does not contain information pertaining to income, profit, loss, or expenditures and cannot qualify as a "trade secret" because that term was ascribed a narrow meaning in *United States ex rel. Norwegian*

[7] On June 1, 1978, the court ordered that the Tariff Commission transmit confidential exhibit 2 to the court under seal. The court's order further specified that the court would inspect the exhibit in camera for the purpose of determining whether it should be made available to opposing counsel under a protective order and for the limited purposes of the present litigation. *Pasco Terminals, Inc.* v. *United States*, 80 Cust. Ct. 249, C.R.D. 78-3 (1978). The Commission transmitted confidential exhibit 2 to the court on this basis. Subsequently, the court examined the exhibit in camera and on June 19, 1978, ordered that it be made available to counsel for plaintiff under a protective order—which was done.

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Nitrogen Products Co. v. *United States Tariff Commission*, 6 F. 2d 491, 495 (D.C. Cir. 1925), *rev'd*, 274 U.S. 106 (1927).

More particularly, in *Norwegian Nitrogen* the Court of Appeals for the District of Columbia stated that the "term 'trade secrets,' as ordinarily understood, means an unpatented, secret, commercially valuable plan, appliance, formula, or process, which is used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities." 6 F. 2d at 495. The court added that "[c]osts of production, of and by themselves, are simply matters of business privacy, the disclosure of which is not forbidden * * *." Ibid. In these circumstances, the court expressed the opinion that cost-of-production information should have been provided to the petitioner but then affirmed the judgment of the lower court denying a writ of mandamus to the Commission.

However, this narrow construction of the term "trade secrets" and the conclusion that "trade secrets" do not cover costs of production are without legal significance. For upon writ of error in *Norwegian Nitrogen*, the Supreme Court vacated the judgment and remanded the case with directions to dismiss the petition as moot. *United States ex rel. Norwegian Nitrogen Products Co.* v. *United States Tariff Commission*, *supra*, 274 U.S. at 112. Moreover, in the later case of *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294 (1933), the Supreme Court stated that "[t]he court of appeals [in the prior *Norwegian Nitrogen* case] expressed an opinion, not called for by its judgment, that the information should have been given." 288 U.S. at 302.

Beyond this, there are several affirmative factors which militate against plaintiff's contention that confidential exhibit 2 is not within the class of documents which can be received in confidence under rule 201.6. These factors are as follows:

First, a widely relied upon definition of a trade secret states that "[a] trade secret may consist of any formula, pattern, device *or compilation of information which is used in one's business*, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." [Italic added.] *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470, 474–475 (1974).

Clearly, business data such as that contained in exhibit 2, which sets forth estimated annual sales to specific customers, identifies correspondence or conversations with specific customers, and discloses the prices charged to such customers on specific dates, qualify as information which gives Freeport an opportunity to obtain an advantage over competitors, such as Azufrera, who do not possess such information. Additionally, exhibit 2 was submitted in confidence because it contained information received in confidence and the disclosure of the names of the companies involved would adversely

affect Freeport's relations with them. Obviously, if the information, which Freeport used in its own business for pricing purposes, had been disclosed, Freeport would have been at a serious disadvantage. Thus, exhibit 2 meets all the requirements of a "trade secret."

Second, the Commission's rule 201.6(a) defines confidential business data as "any information which concerns or relates to the trade secrets, * * * operations, * * * or to the identity, confidential statistical data, amount or source of any income, profits, losses * * * of any * * * firm * * *, the disclosure of which is not authorized * * * by the party furnishing such information."

Since Freeport's income and profits derive from its sales and specific customer names identify the amount and/or source of such income and profit, and Freeport had not authorized disclosure, it would seem clear that the information contained in exhibit 2 meets the Commission's definition of confidential business data.[8]

Third, in *Norwegian Nitrogen Products Co.* v. *United States*, *supra*, 288 U.S. 294, the Court, after examining legislative history and other sources, noted that the Tariff Commission had a settled policy, acquiesced in by Congress, of withholding confidential information when its publication might work hardship or injustice or hamper the work of the Commission. Id. at 303–311, 319–323. Consequently, it held with regard to the Commission's rule which provided for examination of the record except for "trade secrets and processes" (id. at 325):

> * * * The phrase "trade secrets and processes" is not a new one in the law. It occurs in statutes and judicial decisions as well as in the rule. The Commission was without competence by any decision it might make to fix the meaning of the phrase as used by Congress or the courts. It had power, however, to interpret its own rules and any phrase contained in them. *Evans* v. *Backer*, 101 N.Y. 289, 292; 4 N.E. 516; *Duncan's Heirs* v. *United States*, 7 Pet. 435, 451, 452. This it has done by an administrative practice too clear to be misread.

By the same token, rule 201.6(c) makes it clear that the Commission has retained the power to interpret its own rules and any phrase contained in them, including the definition of confidential business data in rule 201.6(a). In this case, of course, the Commission specifically determined that exhibit 2 was entitled to confidential treatment. Not only did it have the power to do so, its interpretation was scarcely unreasonable.

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[8] Plaintiff contends that pricing information could not be a trade secret in the Tampa market because by the very nature of that market a price is disclosed to the trade. Obviously, exhibit 2 was not submitted in confidence because of any general price information since, right after the introduction of the exhibit, a Freeport witness disclosed the prices which were available to all Freeport's customers in the relevant area. Exhibit 2, however, identifies the names of specific customers and discloses those instances in which a lower-than-prevailing price was extended to a specific customer so that the customer would not have to be released from an existing sulphur sales contract under the "meet or release" clause.

Under the circumstances, it must be concluded that the Commission's decision to receive exhibit 2 on a confidential basis was in full compliance with its own rules of practice and procedure.

Whether the Commission Violated Due Process Rights in the Conduct of its Hearing

We turn now to plaintiff's contention that the Tariff Commission violated Azufrera's due process rights in its conduct of the hearing. These asserted violations occurred in connection with an attempt by Azufrera to cross-examine Freeport on the specifics of confidential exhibit 2, and again in connection with Duval's refusal to answer on cross-examination specific questions with regard to alleged lower price offers it had made in the Tampa market, except on a confidential basis.

At the outset, defendant insists that plaintiff has no standing to challenge the alleged due process rights of a third party, i.e., Azufrera. However, it is unnecessary to reach this question. For even assuming arguendo that plaintiff has such standing, it must be concluded for the reasons that follow that no due process violation occurred.

We start with these considerations. First, under 19 U.S.C. 160(a) (1970), the Tariff Commission is permitted to make such an investigation as it deems necessary and need not base its injury determination solely (or even partly) upon the record made at a hearing. Second, under the Commission's rules of practice and procedure, the Commission's determination is based not only upon testimony and other evidence adduced at the hearing, but also upon such information as the Commission obtains through other means. See 19 CFR 201.9, 201.11(c) (1972). Third, the hearing in investigation AA1921–92, and examination of the witnesses, was conducted according to the Commission's existing rules of practice and procedure for the sole purpose of assisting the Commission in obtaining relevant and material facts with respect to the subject matter of the investigation and not in the context of an adversary proceeding. See 19 CFR 201.11, 201.12(b) (1972). Fourth, under the Commission's rules of practice and procedure, any oral or written evidence submitted at a hearing could, upon order of the Commission, be subject to verification from books, papers, and records of the parties submitting the evidence and from any other available source. See 19 CFR 201.12(c) (1972). Fifth, the Commission's determination of injury was not made solely upon the record made at the hearing but after considering all written submissions from interested parties, evidence adduced at the hearing, and all factual information obtained by the Commission's staff from questionnaires, personal inter-

views, and other sources, in conformity with the applicable statute and the Commission's own rules. See 37 F.R. 9417 supra.

With these considerations in mind, no due process violation occurred when in the course of its investigation and factfinding hearing in the present case, the Tariff Commission refused to permit the inspection of a confidential exhibit during cross-examination and restricted the cross-examination of a witness.

Directly relevant is *Hannah* v. *Larche*, 363 U.S. 420 (1960), where the Court held that the rules of procedure adopted by the Commission on Civil Rights do not violate due process although they provided that the identity of persons submitting complaints to the Commission (or the contents of the complaints) need not be disclosed and that those summoned to testify may not cross-examine other witnesses. The following findings of the Court with regard to the Commission on Civil Rights are equally applicable to the Tariff Commission (id. at 441):

> * * * [I]ts function is purely investigative and factfinding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action.[9]

The Court in *Hannah* continued (363 U.S. at 443–444):

> On the other hand, the investigative process could be completely disrupted if investigative hearings were tranformed into trial-like proceedings, and if persons who might be indirectly affected by an investigation were given an absolute right to cross-examine every witness called to testify. Factfinding agencies without any power to adjudicate would be diverted from their legitimate duties and would be plagued by the injection of collateral issues that would make the investigation interminable. Even a person not called as a witness could demand the right to appear at the hearing, cross-examine any witness whose testimony or sworn affidavit allegedly defamed or incriminated him, and call an unlimited number of witnesses of his own selection. * * * This type of proceeding would make a shambles of the investigation and stifle the agency in its gathering of facts.

The Court also thought it highly significant that the Commission's procedures were not historically foreign to other forms of investigation

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[9] These findings are equally applicable to the Tariff Commission since an affirmative injury determination does not deprive anyone of his life, liberty, or property. In this case, the injury determination merely created the possibility that imported Mexican sulphur would be subjected to dumping duties in the event the Customs Service determined on an entry by-entry basis that the purchase price (or the exporter's sales price) of sulphur covered by a specific entry was less than the applicable foreign market valu .

(as noted in an appendix to the opinion) which have traditionally governed the proceedings of the vast majority of governmental investigating agencies (including the Tariff Commission). Id. at 444.

The Court further observed (id. at 445–446):

> The history of investigations conducted by the executive branch of the Government is also marked by a decided absence of those procedures here in issue. * * * The best example is provided by the administrative regulatory agencies. Although these agencies normally make determinations of a quasi-judicial nature, they also frequently conduct purely factfinding investigations. When doing the former, they are governed by the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. secs. 1001–1011, and the parties to the adjudication are accorded the traditional safeguards of a trial. *However, when these agencies are conducting nonadjudicative, factfinding investigations, rights such as appraisal, confrontation, and cross-examination generally do not obtain.* [Italic added.]

Additionally, the Court in *Hannah* relied heavily on *Norwegian Nitrogen Products Co.* v. *United States*, *supra*, 288 U.S. 294, where it was held that the Tariff Act of 1922 did not give witnesses appearing before the Tariff Commission the right to cross-examine other witnesses testifying at Commission hearings. See 363 U.S. at 449–450. As the Court pointed out in *Norwegian Nitrogen*, 288 U.S. at 308: "Nothing in the * * * [Tariff Act of 1922] suggests belief of the lawmakers that every producer or importer is to be viewed, like a party to a lawsuit, as the adversary of every other, with the privilege of examination and cross-examination extended through the series." Similarly, nothing in the Tariff Act of 1930 suggests such right of cross-examination. Indeed, the Tariff Act of 1930 does not even require a hearing but permits the Tariff Commission to make its determination based upon such investigation as it deems necessary.

The short of the matter is that due process does not necessarily require a trial-type hearing or an opportunity to confront and cross-examine witnesses. The fact is that the differences in the origin and function of administrative agencies preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts. E.g., *Mathews* v. *Eldridge*, 424 U.S. 319, 348 (1976); *Hannah* v. *Larche*, *supra*, 363 U.S. at 443–444; *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). Therefore, as previously indicated, when administrative agencies conduct nonadjudicative factfinding investigations, rights such as cross-examination generally do not obtain. *Hannah* v. *Larche*, *supra*, 363 U.S. at 445–446. Indeed, "[a]bsent constitutional constraints or extremely compelling circumstances the administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods

of inquiry capable of permitting them to discharge their multitudinous duties'." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543 (1978).

Plaintiff, however, cites a number of cases which it claims supports its contention that the Tariff Commission unconstitutionally abridged the right of cross-examination. But for the reasons discussed below, none of these cases is in point.

In *Londoner* v. *Denver*, 210 U.S. 373 (1908)—the first case cited by plaintiff—the Supreme Court held that where the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer must have an opportunity to be heard. While an opportunity to submit in writing all objections to and complaints of the tax to the board of public works was insufficient, the Court clearly recognized that many requirements, essential in strictly judicial proceedings, could be dispensed with. A hearing, in its very essence, however, demanded that "he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal." 210 U.S. at 386. Unquestionably, any requirements imposed by *Londoner* v. *Denver* were fully met in this case because Azufrera did have the right to support its allegations by argument and present proof.

ICC v. *Louisville & Nashville Railroad Co.*, 227 U.S. 88, 91 (1913)—also relied on by plaintiff—involved certain class and commodity rates established by the Interstate Commerce Commission pursuant to a statute which gave the right to a full hearing, conferred the privilege of introducing testimony, and imposed the duty of deciding in accordance with the facts proved. In that context, the Supreme Court held that all parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. 227 U.S. at 93. In this case, however, the statutory scheme neither required a hearing nor limited the Tariff Commission's determination to the evidence adduced at the hearing. Rather, the statute permitted the Tariff Commission to conduct such investigation as it deemed necessary.

Moreover, the Supreme Court in *Norwegian Nitrogen Products Co.* v. *United States*, *supra*, 288 U.S. 294, made clear that the holding in the *Louisville & Nashville* case mandating the right of cross-examination at an ICC adjudicatory hearing was not applicable to a Tariff Commission investigative hearing. *Norwegian Nitrogen* involved a claim that a duty assessment was invalid because the Tariff Commission,

in investigating the costs of production for purposes of the flexible tariff provisions of the Tariff Act of 1922, had not given the petitioner the hearing prescribed by the statute.[10] After an extensive review of the statute, legislative history, and past practice of the Commission, which had been acquiesced in by Congress, the Supreme Court in *Norwegian Nitrogen* specifically rejected the applicability of past cases (such as *ICC* v. *Louisville & Nashville Railroad Co.*) in which the word "hearing" as applied to administrative proceedings had been thought to have a "broader" meaning. The Court stated (288 U.S. at 317–318):

> We are not unmindful of cases in which the word "hearing" as applied to administrative proceedings has been thought to have a broader meaning. All depends upon the context. There is no denial of the power of Congress to lay bare to the business rivals of a producer and indeed to the public generally every document in the office of this Commission and all the information collected by its agents. The question for us here is whether there was the will to go so far. The answer will not be found in definitions of a hearing lifted from their setting and then applied to new conditions. The answer will be found in a consideration of the ends to be achieved in the particular conditions that were expected or foreseen. * * * Much is made by the petitioner of the procedure of the Interstate Commerce Commission when regulating the conduct or the charges of interstate carriers, and that of the public service commissions of the States when regulating the conduct or the charges of public service corporations. The Tariff Commission advises; these others ordain. * * * Whatever the appropriate label, the kind of order that emerges from a hearing before a body with power to ordain is one that impinges upon legal rights in a very different way from the report of a commission which merely investigates and advises. The traditionary forms of hearing appropriate to the one body are unknown to the other.* * *

With respect to the statute itself, that is, the Tariff Act of 1922, the Supreme Court (as previously indicated) held in *Norwegian Nitrogen* that nothing in the statute suggested a belief of the lawmakers that every producer or importer was to be viewed, like a party to a lawsuit, as the adversary of every other, with the privilege of examination and cross-examination extended through the series. 288 U.S. at 308. Also, as previously indicated, the statute before this court, i.e., the Tariff Act of 1930, does not even require a hearing, but permits the Tariff Commission to make its determination based upon such investigation as it deems necessary. Thus, Congress obviously did not intend that every producer or importer appearing at an optional

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[10] While the importer's counsel had been allowed to cross-examine the president of the domestic producer as to everything brought out at the public hearing, he had not been allowed to extract from the witness a statement of costs of production. Counsel's subsequent demands for inspection of every particular of evidence gathered by the Commission or its representatives and for examination of any and all witnesses, including the Commission's field agents, were refused.

hearing be viewed as the adversary of every other, with the privilege of unlimited examination and cross-examination.

Plaintiff relies further on *Greene* v. *McElroy*, 360 U.S. 474 (1959) and *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) to support its position that the Tariff Commission violated due process in its restriction of cross-examination in the two instances previously noted. See page 24, supra. However, neither case changed the law with regard to purely investigative and factfinding proceedings conducted by agencies such as the Tariff Commission.[11] *Greene* v. *McElroy* held that in the absence of explicit authorization from either the President or Congress, the Secretaries of the Armed Forces were not authorized to deprive petitioner of his job in a security clearance proceeding in which he was not afforded the right of confrontation and cross-examination. But as pointed out in *Hannah* v. *Larche*, *supra*, 363 U.S. at 452: "The various Security Clearance Boards involved in *Greene* were not conducting an investigation: they were determining whether Greene could have a security clearance—a license in a real sense, and one that had a significant impact upon his employment." [Italic added.] Here by contrast, the Tariff Commission was conducting a nonadjudicative factfinding investigation.

In *Goldberg* v. *Kelly*, the Supreme Court held that welfare recipients could not be deprived of welfare benefits without a hearing with opportunity to confront and cross-examine adverse witnesses. However, in *Mathews* v. *Eldridge*, *supra*, 424 U.S. 319, the Supreme Court later held that due process did not require an evidentiary hearing prior to the termination of social security disability payments and observed that *Goldberg* was the only case in which the Court had held that a hearing approximating a judicial trial was necessary. 424 U.S. at 333. Also the Court in *Mathews* reiterated that due process is flexible and calls for such procedural protections as the particular situation demands and then stated (424 U.S. at 334–335):

> * * * [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. * * *

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[11] *Appalachian Power Co.* v. *EPA*, 477 F. 2d 495 (4th Cir. 1973), also relied upon by plaintiff, adds nothing since there the court basically stressed the need for an appropriate type of hearing. However, in appropriate circumstances the opportunity for informal consultation with designated personnel could meet the due process requirements. See, e.g., *Goss* v. *Lopez*, 419 U.S. 565, 581–584 (1975).

In this setting, the Court in *Mathews* concluded that the private interest that would be adversely affected by an erroneous termination of benefits was likely to be less in the case of a disabled worker than in the case of a welfare recipient in view of other forms of government assistance available to the terminated disabled recipient and that there was therefore less reason than in *Goldberg* to depart from the ordinary principle that something less than an evidentiary hearing is sufficient prior to adverse administrative action.

Measuring the foregoing three factors set out in *Mathews* against the considerations specified in *Hannah*, it must be concluded that the requirement in *Goldberg* for a hearing approximating a judicial trial, with right of confrontation and cross-examination, is simply not applicable to the Tariff Commission hearing here involved.

Whether the Commission's Determination of Injury Was Arbitrary or Capricious

Last, plaintiff contends that on the basis of the record of the Commission transmitted to the court, the Commission's determination of injury was arbitrary, capricious, an abuse of discretion, and not according to law for the following reasons:

1. The Commission, in its determination altogether failed to discuss (a) Duval's role, as a new entrant, as the likely reason for the price depression in Tampa; (b) why the announced price increase in early 1972 did not hold at a time when Azufrera had withdrawn from the Tampa market;[12] (c) the basis upon which the Commission found that LTFV sales had injured or were likely to injure the domestic industry in the east coast market; and (d) why injury, if any, was not de minimis.

2. The Commission committed an error of law because it allegedly equated LTFV sales and offers with injury.

With respect to Duval, plaintiff argues more particularly as follows:

> Specifically, the Commission failed to address the entry of a new, major marketer, DuVal, in 1969, whose Tampa shipments in 1969–71 totaled 624,237 long tons, as compared with Azufrera * * * shipments of 259,520 tons [sic] in the same period. * * * Further, the Commission had evidence that the price depression in the Tampa market was caused by DuVal's entry. DuVal clearly initiated price decreases to $32 and then to $30. * * * There was also evidence before the Commission—undersigned counsel was unaware of it at the time—that offers in the range of $25 to $27 were being made by June 1970. Confidential exhibit 2, page 5, June 26 entry. Further, based on confidential exhibit 2, the $25 offer (i.e., $5 below $30) appears to have been a DuVal offer, since the October 20, 1970 entry shows Azufrera's

[12] According to the plaintiff, "[i]t seems almost unanswerable that, if Azufrera caused the price decrease from $27 to $25, as found by the Tariff Commission, then the price should have moved upward when the domestic producers announced a price increase in early 1972 at a time when Mexican sulphur was not being sold."

price was $27. Since price depression was a crucial issue, and the impact of DuVal's entry was brought to the attention of the Commission, we fail to see how a rational statement of reasons can pin responsibility for price depression on offers of Mexican sulphur without at least making a reasoned statement as to why the new entrant, DuVal, was not responsible, responsible only in part for the price depression.[13] * * *

With respect to the east coast market, plaintiff takes the following position:

> The shipments upon which the duties have been paid and are the subject of Pasco's complaint for refund are east coast shipments. There was no evidence adduced at the hearing that Azufrera or Pasco had engaged in any assertedly disruptive market activity in connection with sales to east coast customers. * * * The Commission cites not a shred of evidence in its opinion. Indeed, the Commission notes that prices along the east coast declined about 40 percent, where Mexican sulphur is sold, and about 40 percent in North Central States, where Mexican sulphur is not sold. On the face of the Commission's decision, it seems obvious that general market conditions not related to Mexican sulphur were responsible for the price decline on the east coast. * * * The Commission has not explained, in any way, how Azufrera's marketing practices injured domestic competitors on the east coast, and its decision in this regard is not rational.

And with respect to its contention that injury, if any, was only de minimis, plaintiff states:

> At the hearing, Azufrera's posture was that all offers made by it were at prevailing prices, as reported to it by its customers. * * * Azufrera introduced numerous letters showing that it had been besieged by customer requests to lower prices to meet competitive offers. * * * It was clear that Azufrera had not been using price depression to gain sales. * * * Azufrera's share of the Tampa market fell as prices fell. Azufrera's east coast sales had also fallen. * * * The evidence was uncontradicted that prices had falled [sic] in U.S. markets where Mexican sulphur was sold by an [sic] much or more as in Tampa and along the east coast. * * * As seen, the domestic industry was unable to sustain an announced price increase in Tampa after Azufrera had withdrawn Mexican sulphur from the market. There was credible, expert testimony that Azufrera, with the smallest market shares in Tampa and along the east coast, would have the least influence on price. * * * Other factors readily explained the reasons for the price depression, including the potential entry of Canadian sulphur, DuVal as a new entrant, and the availability of recovered

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[13] In this connection, plaintiff points out that the Antitrust Division of the Department of Justice—which appeared as a party at the Commission hearing—discussed at length the importance of Duval's entry in creating a condition of oversupply and causing price depression, and argued that the coincident factors of massive oversupply and the entry of Duval, a major new supplier in the domestic market, caused a serious price break. In the Antitrust Division's view, "[i]t is thus clear that the price reductions complained of are the results of factors unrelated to the LTFV margins found and do not support a finding of injury for want of the necessary causal connection * * *."

sulphur from nearby Caribbean and U.S. sources as a growing source of supply. * * * Finally, as the sulphur market became oversupplied, Mexican production of Frasch sulphur was curtailed by 19 percent, whereas U.S. production fell about 5 percent. * * * The far more substantial curtailment by the Mexican industry would tend to negate a finding of injury or likelihood of injury.

In the foregoing circumstances, injury, if any, caused by LTFV offers was de minimis. On the assumption that Azufrera had made lower offers on its own initiative, as alleged, the Department of Justice, crediting the testimony of * * * [an Azufrera expert] argued that the injury was de minimis "[b]ecause the price in Tampa would have reached $25 in 1971 regardless of whether there were Mexican sales—at LTFV or otherwise * * *." * * *

The Commission conceded that "significant injury" had to be shown. However, the Commission failed to make a rational determination that there could be significant injury because it failed to address the foregoing factors, all of which were in evidence before the Commission and stressed in briefs filed with the Commission.

Against the background of these contentions, plaintiff insists that the Commission, in reaching its affirmative injury decision, was obliged to discuss the foregoing relevant facts; that these relevant facts could not be ignored in any rational discussion of the Tampa market in 1969–71; that the Commission did not take these facts into account in reaching its injury decision; and that as a consequence, the Commission decision was arbitrary and capricious.

As underpinning for this argument, plaintiff relies on *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975) which, it says, requires that a rational statement of reasons must address relevant facts. In *Bachowski*, a candidate for election to a union office, after being defeated, filed a complaint with the Secretary of Labor alleging violations of the Labor-Management Reporting and Disclosure Act of 1959, thus invoking a provision of that act which requires the Secretary to investigate the complaint and decide whether to bring a civil action to set aside the election. The Secretary upon investigation decided that such action was not warranted and advised the complainant that "[b]ased on the investigative findings, it has determined * * * that civil action to set aside the challenged election is not warranted." The Court held that in order to enable the reviewing court intelligently to review the Secretary's decision and determine whether or not it was arbitrary or capricious, it was necessary for the Secretary to provide the court and the complaining witnesses with copies of a statement of reasons supporting his decision; and that it was necessary for him to delineate and make explicit the basis upon which discretionary action was taken. A "reasons" requirement, the Court stated, promotes thought by the Secretary and compels him to cover the relevant points and eschew

irrelevancies. However, the Court did not impose a requirement that the statement must discuss reasons in opposition to the determination (or that it must be more detailed and more specific than the determination and statements of reasons in this case). That the Court only intended the inclusion of supporting reasons sufficient to explain the basis of the decision is obvious from its quotation from a prior case to the effect that if there is a rational and defensible basis stated in the reasons statement for the Secretary's determination, then that should be an end of the matter, for it is not the function of the courts to determine whether or not the case should be brought or what its outcome should be. 421 U.S. at 573.

Against the backdrop of these considerations, examination of the Tariff Commission's determination of injury (including the statement of reasons for the affirmative determination of Chairman Bedell and Commissioners Sutton and Moore and the separate statement of reasons for the affirmative determination of Commissioners Leonard and Young) makes it plain that the determination in its entirety presents a rational and defensible basis for the Commission's unanimous determination that an industry in the United States is being injured by reason of the importation of elemental sulphur from Mexico that is being or is likely to be sold at less than fair value within the meaning of the Antidumping Act. See 37 F.R. 9417.

The Commission's statements of reasons adequately cover not only the requisite legal inquiries but also the facts supporting the Commission's conclusions as to injury and causation. The Commission was "under no obligation either to disclose all of the evidence in its possession nor to state in meticulous detail exactly on what basis it applies that evidence in determining injury or likelihood thereof." *City Lumber Co.* v. *United States*, 59 CCPA 89, 95, C.A.D. 1045, 457 F. 2d 991 (1972).

What is more, the applicable statute (19 U.S.C. 160(a) (1970)) permitted the Tariff Commission to make such investigation as it deemed necessary and merely required the Commission, upon making its determination, to publish such determination in the Federal Register, with a statement of the reasons therefor. 19 U.S.C. 160(c) (1970). The statute contained no requirement, such as contained in 5 U.S.C. 557(c) (1970), that the agency must rule on each finding, conclusion, or exception presented by any party appearing before it and must include in its decision a statement of findings and conclusions, and the reasons or bases therefor, on all the material issues of fact, law, or discretion presented on the record.

As seen from the determination itself (37 F.R. 9417) as well as from a summary of its more salient points (which appears in an earlier part of this opinion), the Commission discussed at considerable length its

findings and conclusions as well as statements of the reasons for the affirmative injury determination. Thus, the Commission clearly met its statutory obligations to state the reasons in support of its findings. The statute did not require more.[14]

Further, it is evident from the statement of reasons of Commissioners Leonard and Young that the Commission correctly construed the applicable law. See 37 F.R. 9418. Thus, this statement rightly concluded that the Antidumping Act required that the Commission find two conditions satisfied before an affirmative determination could be made: First, there must be injury, or likelihood of injury, to an industry in the United States; and second, such injury (or likelihood of injury) must be "by reason of" the importation into the United States of the class or kind of foreign merchandise the Secretary of the Treasury determined was being or was likely to be sold at less than fair value.[15]

As to the first condition, the Commission found, on the basis of its investigation, that an industry in the United States (consisting of the domestic facilities of U.S. producers devoted to the mining, recovery, and distribution of sulphur) was being injured because the industry, with large investment in the production of sulphur, had been forced to curtail exploration, shut down facilities, lay off workers, and had found its before-tax profits on sulphur operations substantially reduced. 37 F.R. 9417, 9418. These findings are supported by evidence adduced at the hearing. See transcript of proceedings before the Commission (hereafter "tr.") 26, 32, 39–41, 78–81, 290–292, 297–298, 302, 323.

As to the second condition, the Commission found that there was causation between LTFV imports of Mexican sulphur and the injury to domestic industry because its investigation had revealed that LTFV sales and offers of Mexican sulphur had contributed to the general depression of prices and to market disruption in Tampa and along the east coast of the United States.[16] In fact, a part of the price depression undergone by the domestic sulphur industry since 1968

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[14] In the Trade Act of 1974, Congress amended 19 U.S.C. 160(c) to provide that the Commission, upon making its determination, "shall publish in the Federal Register such determination, whether affirmative or negative, together with a complete statement of findings and conclusions, and the reasons or bases therefor, on all the material issues of fact or law presented (consistent with confidential treatment granted by the * * * Commission, * * * in the course of making its determination)." See 19 U.S.C. 160(d)(2) (1976).

[15] Sec. 201(a) of the Antidumping Act (19 U.S.C. 160(a) (1970)) required the Commission to determine "whether an industry in the United States is being or is likely to be injured * * * *by reason of* the importation of * * * [LTFV] merchandise into the United States." [Italic added.]

[16] The Tampa and the east coast areas of the United States are major sulphur market areas which together account for 40 percent of the sulphur consumed in the United States. They are separate and distinct from other sulphur-consuming markets in the United States because they can only be served by deepwater vessels. Since Mexican sulphur imports can only enter by deepwater vessels, they compete with the domestic industry only in these markets. Tr. 228–230, 237–238. Thus, by considering the Tampa and the east coast markets, the Commission clearly considered the relevant market for purposes of determining whether an American industry was injured "because of" LTFV imports of Mexican sulphur. For logistical reasons, no foreign sulphur other than Mexican sulphur has been entering either the Tampa or the east coast market. See tr. 227–230, 287–280.

and part of the market disruption in Tampa was directly tied to sales and offers of Mexican sulphur at less than fair value. See 37 F.R. 9418. Again, these findings are supported by evidence adduced at the hearing.[17]

It is therefore apparent from its determination that the Commission properly employed criteria which are relevant to the determination as to whether "injury" or "likelihood of injury" in fact existed. The relative weight it gave to those criteria was a matter of discretion and expert judgment.

In sum, the determination and statements of reasons covered all the relevant points and showed a rational and defensible basis for the affirmative determination. Accordingly, the determination must be upheld. For it is basic that having been delegated discretionary authority by the Congress, the Commission's determination may not be disturbed by the court when, as here, it had a rational basis in fact and was not contrary to law. See, e.g., *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971); *Suwannee Steamship Co.* v. *United States*, 79 Cust. Ct. 19, 23–24, C.D. 4708, 435 F. Supp. 389 (1977). And since the Commission has been delegated discretionary authority, it is not the function of the court to weigh the evidence considered by the Commission, determine the credibility of the witnesses appearing at the hearing, and substitute its judgment for that of the Commission; indeed, the Commission decision, if rational and not contrary to law, must be upheld by the court even though that decision is not one the court would have reached had the question first arisen in judicial proceedings. See, e.g., *Imbert Imports, Inc.* v. *United States*, 60 CCPA 123, 127, C.A.D. 1094, 475 F. 2d 1189 (1973); *City Lumber Co.* v. *United States*, 64 Cust. Ct. 826, 832, 834, A.R.D. 269, 311 F. Supp. 340 (1970), *aff'd*, 59 CCPA 89, *supra*.

In view of these and the following considerations, the court cannot agree with plaintiff's arguments to the effect that the Commission determination is not rational because it failed to discuss: DuVal's role as a new entrant in the sulphur market; the 1972 "abortive" increase in sulphur prices; how Azufrera's marketing practices injured domestic competitors on the east coast; and why the injury was not de minimis.

More specifically, as to DuVal's role as a new entrant in the sulphur market, so long as there was a causative link between Azufrera's

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[17] Thus there was evidence before the Commission that both Duval and TGS had lost sales to Azufrera's LTFV sulphur. Tr. 347–348, 404–406. There was also evidence that Freeport had not lost sales to Azufrera because it had preferred to meet the LTFV offers, which were lower than the prevailing prices, rather than to lose substantial quantities of sales particularly in the Tampa area. See tr. 116–120. Testimony indicated that Duval and TGS had not lost sales to a domestic company under the "meet or release" provisions of the sulphur contracts. Tr. 296, 405–406. DuVal and Freeport attributed the price depression during 1970–71 primarily to Azufrera's LTFV sales and offers (e.g., tr. 101, 363), and specific instances of price reductions caused by such offers and sales were cited by Freeport. See tr. 116–120 and exhibit 2.

LTFV sales and offers and the injury to domestic industry, the Commission was correct in finding injury to domestic industry "by reason" of these LTFV sales and offers. To establish the necessary causation, LTFV sales do not have to be the sole cause, the major cause, or greater than any other single cause of injury. Hence, once the Commission found a causative link between LTFV sales and offers and injury to domestic industry, its task in this respect was finished.[18] It simply had no reason to discuss the other causes which had contributed to the injury, be it DuVal's entrance as a major producer or some other factor. In short, when the Commission found that the LTFV sales and offers of Mexican sulphur had contributed to the general depression of prices and to market disruption in Tampa and along the east coast of the United States, it, in effect, found that DuVal was not the sole cause of injury.[19]

Furthermore, contrary to plaintiff's argument, the Commission's determination in its entirety (including both statements of reasons) that the LTFV sales and offers of Mexican sulphur had contributed to the general depression of prices and to market disruption is supported by evidence adduced at the hearing.[20] For there was ample evidence presented to the Commission showing that Azufrera (with its sales and offers of LTFV sulphur below the prevailing prices) was responsible for at least part of the $7 per ton reduction in the Tampa sulphur prices during the period 1970–1971. See, e.g., tr. 101, 116–120, 363, 404–406.

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[18] Sec. 201(a) of the Antidumping Act (19 U.S.C. 160(a) (1970)) which has a "by reason of" injury test should be contrasted with sec. 201(b) of the Trade Act of 1974 (19 U.S.C. 2251(v) (1976)), which requires the Commission to determine whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof. It is further to be noted that the Commission's view regarding cause of injury for antidumping purposes has been subsequently endorsed by the Senate Finance Committee in connection with the Trade Act of 1974. S. Rept. No. 93-1298, 93d Cong., 2d sess. (1974). That report stated (*id.* at 180).

> • • • Under the Antidumping Act, the Commission determines whether a domestic industry "is being or is likely to be injured, or is prevented from being established, by reason of the importation of" the less-than-fair-value imports. The term "injury," which is unqualified by adjectives such as "material" or "serious," has been consistently interpreted by the Commission as being that degree of injury which the law will recognize and take into account. Obviously, the law will not recognize trifling, immaterial, insignificant, or inconsequential injury. Immaterial injury connotes spiritual injury, which may exist inside of persons, not industries. Injury must be a harm which is more than frivolous, inconsequential, insignificant, or immaterial.
>
> Moreover, the law does not contemplate that injury from less-than-fair-value imports be weighed against other factors which may be contributing to injury to an industry. The words "by reason of" express a causation link but do not mean that dumped imports must be a (or the) principal cause, a (or the) major cause, or a (or the) substantial cause of injury caused by all factors contributing to overall injury to an industry.

[19] Inasmuch as Azufrera's LTFV sales were more than insignificantly responsible for the price depression, the Commission was correct in concluding that they were a source of remediable injury to the domestic industry.

[20] Plaintiff refers to the brief submitted by the Antitrust Division to the Commission and contends that the Department of Justice "found" that there could be no causative link between asserted Azufrera LTFV margins and the then present prices. However, the only relevant findings are those of the Commission. The statute charged the Commission, not the Antitrust Division, with determining whether a domestic industry was injured because of the LTFV sales or offers. This the Commission did. And, as stated before, it is not the function of the court to weigh and balance the evidence in the same manner as the Commission. *Imbert Imports, Inc.* v. *United States*, *supra*, 60 CCPA at 127. Moreover, the Antitrust Division recognized that it did not possess all of the facts because it specifically noted in its brief (pp. 10–11) that the Commission had DuVal's confidential list of customers gained in the period in question which should give it a basis for assessing the market dislocations caused by DuVal's entry.

We turn now to plaintiff's argument as to the 1972 abortive price increase. As previously indicated, plaintiff contends that the fact that this increase did not hold at a time when Azufrera had withdrawn from the market makes it almost unanswerable that Azufrera could not have caused the price decrease from $27 to $25 a ton in 1971. For according to plaintiff, if Azufrera had caused the price decrease, then the price should have moved upward when it withdrew from the market. But given the facts that there was testimony before the Commission that Mexico had a large unused surplus capacity (tr. 34–35), that Azufrera could have returned to the U.S. marketplace,[21] which it had left only because of the threat of dumping duty assessments (tr. 525–526, 528), that the antidumping proceedings had not been concluded, and that customers apparently believed that they could purchase sulphur at the "old price" (tr. 283), the failure of the 1972 price increase to "stick" was quite understandable.

Plaintiff's next argument is that there was no evidence adduced at the hearing that Azufrera had engaged in any disruptive activity in connection with sales to east coast customers albeit dumping duties were assessed on east coast shipments. But this argument overlooks the principle that under the Antidumping Act, a national industry may be injured if injury is experienced in only a portion of its market. See *Imbert Imports, Inc.* v. *United States*, *supra*, 60 CCPA at 127; *Ellis K. Orlowitz Co.* v. *United States*, 50 CCPA 36, 40–42, C.A.D. 816 (1963). Once an injury is found anywhere, the Constitution itself requires that any resulting dumping duties be uniformly assessed throughout the United States, wherever the merchandise is entered. Therefore, even if the Commission had found that injurious events occurred only in Tampa, dumping duties still would have been properly assessed on merchandise entered on the east coast.

There is the further consideration that there was considerable evidence about the "ripple" or "spillover" effect of price reductions in the Tampa area into the east coast area. See, e.g., tr. 36–37, 68–70, 278–279, exhibits 2 and 3. In that circumstance, the Commission's additional finding that LTFV sales and offers of Mexican sulphur had also contributed to the general depression of prices and to market disruption along the east coast of the United States was clearly warranted.

This brings us to the plaintiff's contention that injury, if any, was only de minimis. As previously indicated, plaintiff argues that at the hearing Azufrera's posture was that all offers made by it were at prevailing prices and that it was clear that Azufrera had not been using price depression to gain sales. However, there was substantial evidence before the Commission to the effect that the actual price reduction in

[21] According to the testimony, Azufrera's sulphur can reach Tampa in a week or less. Tr. 555.

Tampa was due to LTFV sales and offers of Azufrera sulphur at lower than the prevailing prices; that such sales or offers reduced the prices in Tampa (as well as in the east coast market due to the "ripple" or "spillover" effect); and that such LTFV sales led to a loss of revenue. Tr. 36–37, 68–70, 113–114, 278–279, exhibits 2 and 3.[22]

Plaintiff's final contention is that the Commission made an error of law because it allegedly equated LTFV sales and offers with injury. As support for this position, plaintiff relies on the following sentence contained in the statement of reasons for affirmative determination of Chairman Bedell and Commissioners Sutton and Moore (37 F.R. 9418): "When price sensitivity reaches the degree which characterized the U.S. sulphur market in and since 1969, LTFV sales and offers would almost inevitably cause an injurious impact." But as seen from their statement of reasons, these Commissioners first noted specifically that the investigation had revealed that the LTFV sales and offers of Mexican sulphur had contributed to the general depression of prices and to market disruption in Tampa and along the east coast of the United States. 37 F.R. 9417. They then proceeded to discuss the various factors involved (such as the economic conditions in the domestic industry, the extent of the LTFV sales and offers, and price depression and market disruption) in greater detail. It is in the context of discussing the extent of LTFV sales and offers that these Commissioners stated that "[w]hen price sensitivity reaches the degree which characterized the U.S. sulfur market in and since 1969, LTFV sales and offers would almost inevitably cause an injurious impact." 37 F.R. 9418. In so doing, it is apparent that they were not equating injury for purposes of the Antidumping Act with LTFV sales and offers, because they had already determined that LTFV sales and offers had contributed to the general depression of prices and to market disruption.

Conclusion

For the foregoing reasons, defendant's motion for summary judgment is granted; plaintiff's cross-motion for summary judgment is denied; and the action is hereby dismissed.

(C.D. 4824)

ROHR INDUSTRIES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Turbotransmissions

Turbotransmissions incorporated in turboliner trains classified as other speed changers under item 680.47, TSUS, *held* properly subject

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[22] As set out previously in this opinion, there was evidence before the Commission that Azufrera was responsible for initiating price decreases in the Tampa market in a number of specific instances.

to classification under item 690.40, TSUS, as other parts of self-propelled rail vehicles.

A transmission is used for the purpose of transmitting power from the turboengine to the wheels of a vehicle. Power transmissions are not described in the superior heading of subpart J, part 4, schedule 6. Accordingly, pursuant to headnote 2, part 4, schedule 6, the transmission is not classifiable under either item 680.47 or 680.52.

Classification under item 678.50, TSUS, the basket provision, does not apply when a more specific provision (item 690.40) is involved.

The transmissions being parts of self-propelled rail vehicles are properly subject to classification thereunder since item 678.50 has been held not to be a specific provision within the intendment of General Interpretative Rule 10(ij). *Ideal Toy Corporation* v. *United States*, 58 CCPA 9, C.A.D. 996, 433 F. 2d 801 (1970).

Court No. 76-8-01939

[Judgment for plaintiff.]

(Decided October 5, 1979)

Stein, Shostak, Shostak & O'Hara, Inc. (*John N. Politis* at the trial and on the briefs) for the plaintiff.

Alice Daniel, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Laura D. Millman* at the trial; *John J. Mahon* on the brief), for the defendant.

FORD, Judge: Plaintiff imported certain turbotransmissions, designated as Voith L 411 brU, for incorporation in turboliner trains operated by Amtrak. The merchandise was classified by Customs upon liquidation as "Other speed changers" under item 680.47, TSUS, as modified by T.D. 68-9, and assessed with duty at $1.12 each plus 17.5 per centum ad valorem.

Plaintiff contends the classification is erroneous and that said merchandise is properly subject to classification as "Torque converters" as provided for in item 680.52, TSUS, as modified by T.D. 68-9, and as such subject to duty at 4.5 per centum ad valorem. This is based upon the premise that the principal purpose of the transmission is its operation as a torque converter. Alternatively, plaintiff contends if the court finds the transmissions do not have a principal purpose, then by virtue of headnote 2, part 4, schedule 6, they should be subject to classification as a "machine not specially provided for" under item 678.50, TSUS, as modified by T.D. 68-9, which provides for duty at the rate of 5 per centum ad valorem. If, however, the court finds neither of the above are applicable, plaintiff asserts the proper classification is under item 690.40, TSUS, as modified by T.D. 68-9, as other parts of self-propelled rail vehicles and as such dutiable at 5.5 per centum ad valorem. Defendant agrees with the latter conten-

tion if the court finds the classification to be erroneous and the other claims not to apply since item 690.40 is more specific than item 678.50.

The pertinent statutory provisions are as follows:

SCHEDULE 6.—METALS AND METAL PRODUCTS

* * * * * * *

PART 4.—MACHINERY AND MECHANICAL EQUIPMENT

Part 4 headnotes:

* * * * * * *

2. Unless the context requires otherwise, and subject to headnote 1 to subpart A of this part, a multipurpose machine is classifiable according to its principal purpose, but if such a machine is not described in a superior tariff heading as to its principal purpose, or if it has no one principal purpose, it is classifiable in subpart H of this part as a machine not specially provided for.

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Subpart H.—Other Machines

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678.50	Machines not specially provided for, and parts thereof	5% ad val.

* * * * * * *

Subpart J.—Parts of Machines

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	Gear boxes and other speed changers with fixed, multiple, or variable ratios; pulleys, pillow blocks, and shaft couplings; torque converters; chain sprockets; clutches; and universal joints; all the foregoing (except parts of agricultural or horticultural machinery and implements provided for in item 666.00 and parts of motor vehicles, aircraft, and bicycles) and parts thereof:	
	Gear boxes and other speed changers, and parts thereof:	
*	*	*
680.47	Other speed changers	$1.12 each+ 17.5% ad val.
*	*	*
680.52	Torque converters, and parts thereof	4.5% ad val.

* * * * * * *

PART 6.—TRANSPORTATION EQUIPMENT

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Subpart A.—Rail Locomotives and Rolling Stock

* * * * * * *

690.10	Self-propelled rail vehicles designed to carry passengers or articles	* * *
*	* * * * * *	
	Parts of the foregoing articles:	
*	* * * * * *	
	Other:	
*	* * * * * *	
690.40	Other	5.5% ad val.

The record consists of the testimony of four witnesses called by plaintiff and one on behalf of the defendant. Six exhibits were received in evidence for plaintiff and four on behalf of the defendant.

Mr. James A. Sieglitz, a customs coordinator for the plaintiff, testified that his duties consisted of reviewing contracts relating to importations and exportations of his company. The witness was familiar with L 411 brU turbotransmissions which were incorporated in the Amtrak turboliners manufactured by his company. Mr. Sieglitz identified a cutaway of one of the two power cars which, together with three other cars, make up a train set. It was received in evidence as plaintiff's exhibit 1. The transmission portion of the exhibit is circled in red.

Plaintiff thereafter called Mr. Wolfgang Paetzold, a well-qualified engineer for Voith Getriebe KG, the manufacturer of the Voith turbotransmission. Mr. Paetzold received an engineering degree from the University of Dresden. The Voith company, according to the witness, is a manufacturer of water turbines, paper machines and transmissions. He was familiar with the turbotransmission involved since in the 1960's there was a demand for high-speed railcars. Mr. Paetzold delivered the parameters of the transmission to the design department of Voith.

The witness identified exhibit 2 as a cross-section view which schematically depicts the transmission. One "X" was placed on exhibit 2 to identify the torque converter, two "X's" were placed on the exhibit which identified the fluid coupling, and three "X's" were placed on the exhibit to identify the hydrodynamic brake.

The turbotransmission, according to Mr. Paetzold, is a special railway transmission designed specially for propelling railcars and interacting with a gas turbine. In the opinion of the witness, the train could not operate without the turbotransmission. The witness was further of the opinion that said transmission was a machine. In addition to the type of transmission involved, mechanical-drive and electrical-drive transmissions are also utilized for railway-propelling systems. In a mechanical drive, the gas turbine is coupled to the wheels by gears which are in constant mesh. In an electrical drive, the gas turbine drives a generator to produce electricity which is supplied to the electric traction motors.

Exhibit 3 is a schematic drawing shaded in various colors to show the components. The yellow area encompasses the hydrodynamic brake and its control elements; the green area the torque converter and its control elements; the pink area the fluid coupling; and the orange area the reversing gear mechanism.

The torque converter, the witness stated, is a device which has as its main purpose the multiplying of torque. Torque is the turning effect of the force at the wheel. The force at the wheel of a locomotive is known as the tractive effort. The purpose of the Voith turbotransmission is to improve the performance characteristic of the gas turbine with a mechanical drive by multiplying the torque. The mechanical drive, while the simplest, has the disadvantage of generating very low torque at low and medium speeds, and the acceleration is very poor. In addition, it is difficult for a train with a mechanical drive to maintain high speed on a grade due to the limited torque generated by the gas turbine. The turbotransmission exerts its maximum torque at zero speed of the railcar. The torque multiplication factor is approximately 7, which means the torque at zero is seven times higher than the torque at maximum speed.

The witness, in explaining how the turbotransmission operates, stated that when the turboengine is first started there is no oil in the torque convertor and, therefore, no torque is being transmitted to the wheels of the railcar. The parts shown in red on exhibit 2 rotate when the turboengine is running. In order to provide motion for the train, fluid is sucked from the oil pump into the torque converter. The oil then strikes the turbine runner which causes it to rotate. The turbine runner is connected by means of gears to the wheels of the train which causes it to move. When the train reaches 70 percent of its maximum speed, the turbotransmission automatically changes over from the torque convertor to the fluid coupling, which has a higher efficiency at this speed range than the torque converter. The witness indicated the top speed of the railcar is 125 miles per hour.

Mr. Paetzold testified that the hydrodynamic brake is used to achieve the braking force without the use of a mechanical brake. When the hydrodynamic brake is filled with oil, the train is decelerated because the stator is standing still which retards the rotor of the hydrodynamic brake. This operation creates heat which is dissipated in the heat exchanger and enables the car to be braked, minimizing the wear and tear on the mechanical brake. The torque converter is unable to transmit torque in a reverse direction so the reversal capability is accomplished by a series of gears. This is necessary since the power car at the end of the train must use the reversal mechanism to assist in the movement of the train. In addition, an

electrical motor is incorporated since the turboliner operates in New York tunnels, requiring third-rail equipment for use on the train.

Mr. Paetzold testified further that there are input and output gear sections incorporated in the transmission. They are both fixed-speed reducing gears also known as constant speed changers. The input gears connect to the input shaft and are designed to reduce the input speed of the turbine engine of 5,700 to 4,500 revolutions per minute, the speed at which the transmission absorbs the required power from the gas turbine. In the output section of the transmission, the maximum speed of 125 miles per hour is accomplished by 2,200 revolutions per minute at the output shaft. The speed changer is designed in order to produce this speed.

According to the witness, the turbotransmission has no other use than with self-propelled rail vehicles and is necessary for the efficient operation of said vehicles. The witness was of the opinion that the principal function of the turbotransmission is its torque multiplication which is provided by the torque converter. The turbotransmission could operate without the hydrodynamic brake inasmuch as the train has mechanical brakes to perform the braking function.

The witness testified there was no specific relationship between torque and speed when the turbotransmission is in the torque converter range. However, he indicated that as output speed increases, the output torque decreases. Accordingly, the witness was of the opinion that the turbotransmission was not a speed changer since its purpose was to multiply torque and not change speed. The main objective of the turbotransmission is to produce torque, and change of speed was subservient to the torque.

Plaintiff then called Mr. Jerome R. Pier, an engineer presently employed by Westinghouse Air Brake Division of WABCO as manager of passenger transit marketing. Prior to that, Mr. Pier was employed by plaintiff as manager of special projects which involved examination of the turboliner program, and subsequently was appointed manager of the program. He received his B.A. in mechanical engineering from Pennsylvania State University, has written a number of technical papers, and holds 12 patents which are related to the rail transportation field. He testified the turbotransmission was essential to the self-propelled turboliner and necessary to multiply the torque. Mr. Pier testified that speed does not play a direct role in the torque converter. In his opinion, a train could operate without the hydrodynamic brake since it is supplemental to the friction brake. In his opinion, the turboliner could also operate without the fluid coupling since it merely increases the efficiency of the turboliner when it is operating at a higher speed. The turboliner could not, in his opinion, operate without the torque converter.

According to Mr. Pier, a speed changer is a device for changing speed of an output shaft in relation to the input shaft, and when there is a change in speed there is an inverse change in torque. Therefore, when speed increases torque decreases. Mr. Pier further testified the torque converter is not a speed changer since its primary function is to multiply torque.

Mr. John W. Rogers, an engineer employed by plaintiff, testified that he graduated from Cornell University with a B.A. in electrical engineering. He was familiar with the transmission since it was his responsibility to see that it was installed in the train and to prepare test procedures. Prior to his association with plaintiff, he was employed by United Aircraft which also produced a turboliner. The United Aircraft train had a direct-drive transmission system between the gas turbine and the wheels. One of the disadvantages of the United Aircraft turbotrain was that it had limited torque at low speeds, which resulted in slower acceleration. The witness was familiar with the torque converter and stated that it served the function of multiplying input torque to the output shaft.

Mr. Andrew F. Charwat, a professor at the University of California, Los Angeles, testified on behalf of the defendant. His testimony related to the torque characteristics of a cone pulley. The witness had no practical experience with turbotransmissions of the type involved.

It is evident to the court, based upon the evidence of record and a consideration of the multitude of cases which have determined for tariff purposes the term "machines," as well as the agreement of both parties, that the Voith turbotransmissions are in fact machines. In view of headnote 2, part 4, schedule 6, the primary question is whether the transmission is a multipurpose machine, a speed changer or torque converter.

The record establishes the turbotransmission is composed of a number of components which perform varied and separate functions as follows:

1. Torque converter which multiplies torque to improve acceleration.
2. Hydrodynamic brake to assist the friction brake of the train.
3. A reversing mechanism which permits the railcar to operate in both directions.
4. A fluid coupling which is used after the train reaches a specific speed and which improves efficiency at high speeds.
5. Fixed ratio reducing gears (speed changer) at the input to the transmission. This reduces the rotation of the turbine to make it compatible with the input speed of the transmission.
6. Fixed ratio reducing gears (speed changer) reduce the output rotation speed of the transmission compatible with the rotational requirement of the drive wheels of the railcar.

7. A coupling device which enables the train to operate by an electric motor when used in the tunnels at New York City.

8. Various other components such as filling pumps, governors, sensors, and an oil cooler fan.

In view of the foregoing, it is apparent the Voith turbotransmission is a multipurpose machine. It is likewise obvious that the mechanism contains a torque converter, item 1, and two speed changers, items 5 and 6, as well as other components. Headnote 2 requires the court to determine whether there is one principal purpose. While the transmission contains among other components a torque converter and two speed changers, it is neither of these for tariff purposes. The principal purpose of the transmission is to transmit power from the turboengine to the wheels of the train. Power transmissions are not described in the superior tariff heading of subpart J and, accordingly, following headnote 2, said articles should fall within item 678.50.

However, item 678.50 is a basket provision which is not as specific as the alternatively claimed provision for parts of self-propelled rail vehicles as provided for in item 690.40. The court notes general interpretative rule 10(a)[1] which provides the headnote involved is subject to the rules of statutory interpretation and judicial rulings. It is apparent on its face that item 690.40 is more specific than item 678.50. Since defendant does not dispute the transmissions to be machines and since item 678.50 has been held not to be a specific provision within the scope of general interpretative rule 10(ij), *Ideal Toy Corporation* v. *United States*, 58 CCPA 9, C.A.D. 996, 433 F. 2d 801 (1970), the court finds the Voith transmissions to be properly subject to duty at 5.5 per centum ad valorem under item 690.40 as alternatively claimed.

Judgment will be entered accordingly.

(C.D. 4825)

BORDER BROKERAGE CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Steel Reinforcing Bars

ISSUES NOT PLEADED—ABANDONMENT OF PLEADED ISSUES—DISMISSAL OF ACTION

Action challenging administrative dumping finding covering importations of steel reinforcing bars from Canada must be dismissed

[1] 10. *General interpretative rules.*—For the purposes of these schedules—

(a) The general, schedule, part, and subpart headnotes, and the provisions describing the classes of imported articles and specifying the rates of duty or other import restrictions to be imposed thereon are subject to the rules of interpretation set forth herein and to such other rules of statutory interpretation, not inconsistent therewith, as have been or may be developed under administrative or judicial rulings.

for failure of proof where claims asserted by the importer for the first time in its brief are outside the parameters of the complaint, and, as such, are not properly before the court, and the importer has in effect abandoned the claims asserted in the complaint, the regularity of the administrative determinations being presumed in the absence of evidence to the contrary.

Consolidated Court No. R65/10840

[Dismissed.]

(Decided October 11, 1979)

Glad, Tuttle & White (*Steven W. Baker* at the trial; *George R. Tuttle* on the briefs) for the plaintiff.

Alice Daniel, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch (*Velta A. Melnbrencis*, Assistant Director, at the trial and on the brief); *Michael H. Stein*, General Counsel, and *Edward R. Easton*, Attorney, U.S. International Trade Commission, of counsel; for the defendant.

RICHARDSON, Judge: The merchandise in this case consists of steel reinforcing bars manufactured in and exported from Canada between February 19, 1963, and March 6, 1964, and appraised upon entry at Blaine and Sumas, Wash., on the basis of export value as defined in 19 U.S.C.A., section 1401a(b) (sec. 406(b) of the Tariff Act of 1930, as amended). The issue before the court relates to the imposition of dumping duties as provided for under 19 U.S.C.A., section 160, et seq. (sec. 201, et seq. of the Antidumping Act of 1921, as amended), no question having been raised concerning the underlying appraisement of the merchandise.

The record shows: (1) That the Secretary of the Treasury determined, pursuant to proceedings instituted under the Antidumping Act, that steel reinforcing bars from Canada, manufactured by Western Canada Steel Ltd. through its subsidiary, the Vancouver Rolling Mills Ltd. of Vancouver, Canada, are being, or are likely to be, sold at less than fair value (LTFV) within the meaning of section 201(a) of the Antidumping Act of 1921, as amended (19 U.S.C.A., sec. 160(a)) (28 F.R. 14245, exhibit 2) and on December 23, 1963, advised the U.S. Tariff Commission (Commission) accordingly; (2) that on March 23, 1964, the Tariff Commission determined that an industry in the United States is likely to be injured by reason of the importation into the United States of steel reinforcing bars from Canada, manufactured by Western Canada Steel Ltd. through its subsidiary, the Vancouver Rolling Mills Ltd. of Vancouver, Canada, sold at less than fair value within the meaning of the Antidumping Act of 1921, as amended (29 F.R. 3840, exhibit 4); and (3) that on April 21, 1964, a "finding of dumping" was published pursuant to section 201(a) of the Antidumping Act (19 U.S.C.A., sec. 160(a)) on behalf of the Secretary of the Treasury (29 F.R. 5341, exhibit 5).

From an adverse administrative determination rendered by Customs officials against plaintiff's appeals for reappraisement, plaintiff instituted this action challenging the Secretary's LTFV determination as well as the Commission's injury determination. In its complaint plaintiff alleges:

> 11. Plaintiff claims the imposition of antidumping duties is illegal, null, and void on the grounds that depression of prices for steel reinforcing bars was caused by trends in the U.S. economy independent of importations at less than fair value, that the loss of sales attributed to imported steel reinforcing bars sold at less than fair value were de minimus [sic]; that the competitive market area considered in this finding amounted to about 5 percent of all rebars sold in the United States at the time of consideration; that likelihood of injury was de mimimus [sic]; that likelihood of injury was not caused by less-than-fair-value importation.

The foregoing allegations were indicated at the trial to be the basis of plaintiff's contention that the Secretary's LTFV determination was predicated upon an insignificant quantity of merchandise involved in sales to the United States in derogation of the requirements of 19 CFR, section 14.7(b)(8).

As to the Commission's injury determination, the complaint alleges:

> 12. The industry constituting domestic production of steel reinforcing bars was not injured by sales at less than fair value.
>
> * * * * * * *
>
> 16. Plaintiff claims the imposition of antidumping duties is illegal, null, and void on the ground that the Tariff Commission exceeded its statutory authority and denied the rights of the plaintiff to a fair and partial [sic] adjudication as guaranteed by the due process clause of the fifth amendment and the Administrative Procedure Act by finding the likelihood of injury to an American industry to exist when the evidence failed to support the finding that an injury was likely to be caused to an American industry by importations at less than fair value.
>
> 17. Plaintiff claims the imposition of antidumping duties is illegal, null, and void on the ground that the Tariff Commission violated its statutory authority and denied the plaintiff the right to a fair and impartial administrative adjudication as guaranteed by the due process clause of the fifth amendment and the Administrative Procedure Act by basing its likelihood of injury determination in part on the mere presence of sales at less than fair value.
>
> 18. Plaintiff claims the imposition of antidumping duties is illegal, null, and void on the ground that the Tariff Commission functioned as an agency within the meaning of the Administrative Procedure Act and its determination of likelihood of injury should be set aside as arbitrary.

Rounding out the evidence in the case which was introduced by plaintiff at the trial, in addition to the aforementioned exhibits,

are letters addressed to Western Canada Steel Ltd. and Vancouver Rolling Mills Ltd. from the Deputy Commissioner of Customs and the Acting Deputy Commissioner of Customs under dates of August 26, 1963, and November 29, 1963, respectively (exhibit 1), and a transcript of oral testimony given at a public hearing held before the Commission on February 11, 1964 (exhibit 3). The object of the documentation is said by counsel for the plaintiff to be "to submit these cases wholly on documentary evidence, on a wholly documentary record, using the official records of the investigations by the Secretary of the Treasury and Tariff Commission as supporting evidence for claims that the Secretary and the Commission failed to properly interpret and apply the laws and regulations governing the less-than-fair-value determination and the injury or likelihood of injury determination" (R. 3–4).

However, turning to plaintiff's brief, the court finds that plaintiff's disenchantment with the "finding of dumping" lies not with the Treasury Secretary's LTFV determination per se nor with the Commission's injury determination per se in the particulars as set out in its complaint, but rather with the manner in which the Commission voted its injury determination. In the brief, plaintiff contends that the provision in 19 U.S.C.A., section 160(a) (sec. 201(a), Antidumping Act of 1921, as amended) which allows the Commission to make a finding of likelihood of injury upon a divided vote of the Commissioners voting, as in this case, is in violation of parliamentary law, the rules of Congress, the 10th amendment to the Federal Constitution, the due process clauses of the fifth and 14th amendments to the Federal Constitution, fundamental rights, and the concept of ordered liberty (plaintiff's brief, p. 7).

None of these belated contentions advanced in plaintiff's brief are even remotely connected with allegations of the complaint. Moreover, the due process claims set forth in paragraphs 16 and 17 of the complaint are addressed to evidentiary considerations, while the due process contention in plaintiff's brief is not addressed to evidentiary matters or to the underlying administrative record at all. Consequently, the court fully agrees with defendant that the matters discussed in plaintiff's brief are wholly outside of the parameters of the pleadings, and, as such, are not properly before the court. *Cf. Charberjoy Distributors, Inc.* v. *United States*, 65 Cust. Ct. 459, 462, C.D. 4123 (1970), *aff'd on other grounds*, 59 CCPA 207, C.A.D. 1068, 465 F. 2d 922 (1972). And since plaintiff has in effect abandoned its claims

as pleaded, the *regularity* of the challenged administrative determinations are presumed, the court not being persuaded of the existence of evidence in the record to the contrary. See *Norwegian Nitrogen Products Co.* v. *United States*, 20 CCPA 27, 38, T.D. 45674 (1932), *aff'd*, 288 U.S. 294 (1933). In view of the 14-year lifespan of the case during which plaintiff has had ample opportunity to develop a plenary record for meaningful judicial review of the administrative determinations herein, the court is constrained to and does dismiss this action for failure of proof. See *Atkins Kroll & Co., Ltd.* v. *United States*, Consolidated Court No. R65/10806, decided September 10, 1979, as C.D. 4821.

Judgment will be entered herein accordingly.

(C.D. 4826)

WESTWAY TRADING CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

On Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment

Court No. 78-3-00402

I. Language specifying the date of exportation of merchandise to the United States contained in an Order of the Secretary of the Treasury implementing Presidential Proclamation 4074 and interpreted by regulations and instructions issued by the Commissioner of Customs and repeated on one occasion only in a Presidential proclamation issued by a subsequent Chief Executive at a different time and under differing circumstances cannot be presumed to bear the same interpretation contained in the regulations and instructions issued by the Commissioner of Customs specifically with respect to the Order of the Secretary of the Treasury implementing Presidential Proclamation 4074.

II. The date of exportation of merchandise imported from a foreign country to the United States is the time the merchandise actually leaves the country of exportation for the United States.

III. Merchandise laden on a vessel at a port in a foreign country for exportation to the United States which vessel proceeded therefrom to another port in the same country is not deemed to have been exported to the United States on the date the vessel departed the initial port of lading.

[Judgment for defendant.]

(Decided November 1, 1979)

Murray Sklaroff for the plaintiff.

Alice Daniel, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Saul Davis* on the briefs), for the defendant.

BOE, Judge: The plaintiff has filed a motion for summary judgment contesting the imposition of duty imposed pursuant to item 155.20, TSUS, as modified by Presidential Proclamation 4463, upon merchandise consisting of approximately 7,000 long tons of raw sugar exported from Peru and entered at the Port of Baltimore, Md., on November 2, 1976. A protest to the assessment was filed by the plaintiff which was denied by the Customs Service.

The defendant has filed a cross-motion for summary judgment contending that the duty assessed by the District Director of Customs is correct and that, accordingly, the motion of the plaintiff herein should be denied and the above-entitled action dismissed.

In connection with the respective motions the following material facts have been submitted as undisputed.

On or about September 11, 1976, the plaintiff by contract with the Falmouth Shipping Co. Ltd., chartered the vessel M/V *Falmouth* for the purpose of transporting sugar from Peru to the United States, the loading ports being designated as (1) Salaverry and (2) Eten and/or Pimentel.[1] Pursuant to this charter agreement the sugar was laden on the vessel at the Port of Salaverry, Peru, on September 16–17, 1976, which vessel departed Salaverry on September 18, 1976, and proceeded to the Port of Pimentel, Peru, at which latter port additional sugar was laden. The vessel departed the Port of Pimentel, Peru, for the United States on October 5, 1976.

On September 21, 1976, Presidential Proclamation 4463 (41 F.R. 41681) was issued modifying prior proclamations and thereby increasing the duty on sugar imported into the United States under item 155.20, TSUS. Presidential Proclamation 4463 was modified by Presidential Proclamation 4466 (41 F.R. 44031) under date of October 4, 1976, providing in part that the provisions of Presidential Proclamation 4463 "* * * shall not be effective with respect to articles exported to the United States before 12:01 a.m. (U.S. eastern daylight savings time), September 21, 1976, provided that such articles are entered or withdrawn from warehouse, for consumption on or before November 8, 1976."

The sole issue presented to this court is whether the merchandise in question which was laden on the vessel which departed Salaverry, Peru, on September 18, 1976, was "exported to the United States before 12:01 a.m. * * * September 21, 1976" within the intendment of Presidential Proclamation 4466. In support of its contention that the sugar cargo laden at the Port of Salaverry, Peru, is exempt from any increased duty, the plaintiff urges that a similar construction should be given to the date of exportation contained in Presidential Proclamation 4466 as given to the same phraseology contained in

[1] Exhibit 6.—Plaintiff's motion for summary judgment.

additional duty order No. 3 (36 F.R. 17667) (1971) issued by the Secretary of the Treasury establishing certain specific exemptions from the surcharge initially imposed by Presidential Proclamation 4074 (36 F.R. 15724) (1971).[2] Pursuant to the authority granted to him in Presidential Proclamation 4074, the Secretary of the Treasury in additional duty order No. 3 provided that articles "exported" to the United States before 12:01 a.m., August 16, 1971, were exempt from the surtax. In addition, the Secretary therein authorized the Commissioner of Customs to prescribe such regulations and issue such instructions necessary to carry out the purposes of that order. In determining the date of exportation under the provisions of additional duty order No. 3, the Commissioner of Customs thereupon under date of September 3, 1971, directed a telegram to all Regional Commissioners and District Directors of Customs setting forth the regulations and guidelines to be followed in making such a determination, specifically providing in pertinent part: "Where goods are exported from the country of exportation by vessel, and where the vessel lades merchandise at two or more ports within that country, the date of exportation for each of the shipments shall be the date upon which the shipment left the port at which it was laden. * * *"[3]

It is upon the foregoing regulation and instruction that the plaintiff predicates its claim that the departure of the charter vessel from the Port of Salaverry, Peru, as distinguished from its subsequent departure from the Port of Pimentel, Peru, constitutes the "date of exportation" to the United States as allegedly intended by Presidential Proclamation 4466.

Although Presidential Proclamation 4074 and additional duty order No. 3 gave rise to the litigation comprising *United States* v. *Hugo Stinnes Steel & Metals Co.*, 66 CCPA 84, C.A.D. 1226, 599 F. 2d 1037, June 7, 1979, the facts involved therein cause it to be of little value in the determination of the issue involved in the case at bar. In *Hugo Stinnes*, no dispute existed as to the date the merchandise in question was shipped from its country of origin, Japan. The issues therein rather related to the question of the destination of the merchandise at the time of its exportation as well as to the question of a possibility of a diversion of the merchandise after exportation to a destination other than the United States. No authority has been brought to the attention of this court supporting plaintiff's hypothesis with respect to its contended construction of the language contained in Presidential Proclamation 4466.

[2] The proclamation directed that subpart C be inserted immediately after subpart B of part 2 of the appendix to the Tariff Schedules of the United States. By the terms of headnote 4(a) of subpart C express authority was delegated to the Secretary of the Treasury to "* * * take action to reduce, eliminate, or reimpose the rate of additional duty herein or to establish exemption therefrom * * *."

[3] Exhibit 4.—Plaintiff's motion for summary judgment.

It is true that the language contained in the latter proclamation "* * * articles exported to the United States before 12:01 a.m. * * * September 21, 1976 * * *" is similar to the language contained in additional duty order No. 3 issued by the Secretary of the Treasury in delineating the exemptions from the surtax assessed in Presidential Proclamation 4074. However, this court is not persuaded that a single repetition in Presidential Proclamation 4466 of the phraseology contained in additional duty order No. 3 contemplates the same construction expressed in the instructions and regulations, heretofore referred to, issued by the Commissioner of Customs on September 3, 1971. Contrary to the assertion of the plaintiff, the case of *United States* v. *Curley-Bates Co.*, 46 CCPA 14, C.A.D. 688 (1958), cannot be deemed supportive of the interpretation urged by the plaintiff nor in any way applicable in the instant proceedings. In the foregoing decision the term in controversy had been judicially interpreted and thereafter included in three successive tariff acts without any indication of a change in meaning. By virtue of such continued and repeated usage, our appellate court held that congressional approval of the initial judicial interpretation was indicated. The plaintiff acknowledges that the language in question in the instant action appears to have been used only on the two occasions specifically referred to. Neither judicial interpretation, nor long standing, nor repeated usage can be said to imprint upon the phraseology contained in Presidential Proclamation 4466 the construction once given by the Commissioner of Customs in the regulations issued by him relating to additional duty order No. 3. A repetition of language occurring for the first time in Presidential Proclamation 4466, in the absence of further explanatory guidance, cannot in itself give rise to the alleged presumption that the President intended such language to be interpreted in the same manner as the regulations and instructions once previously issued by the representative of a former executive on a prior occasion and under different circumstances.

On its face, the directive containing the regulations and instructions issued by the Commissioner of Customs relating to additional duty order No. 3, and upon which plaintiff predicates its claimed interpretation, appears to indicate its applicability to additional duty order No. 3 only. In fact, a similar construction never previously nor subsequently has been applied by the Commissioner of Customs in determining the date of exportation of merchandise under facts existing similar to those in the instant action. Of particular interest is the interpretation given by the Commissioner of Customs to the subsequent additional duty order further implementing Presidential Proclamation 4074 and issued by the Secretary of the Treasury after the issuance of additional duty order No. 3. The record herein indicates that on

December 18, 1971, the Secretary of the Treasury promulgated additional duty order No. 4 (37 F.R. 887) which further excluded from the 10 percent surcharge provided by Presidential Proclamation 4074 certain textile articles. In again providing regulations and guidelines relating to a determination of the date of exportation of such textile articles, the Commissioner of Customs under date of January 26, 1972, directed [4] that the date of exportation thereof was to be determined in accordance with section 14.3(b), Customs Regulations,[5] and specifically prohibited the determination of the date of exportation in the manner specified in his prior directive to additional duty order No. 3 under date of September 3, 1971.

It would appear manifestly clear, therefore, that except for the specific instructions issued by the Commissioner of Customs relating to the interpretation of the term "exported" with respect to additional duty order No. 3, all other regulations and instructions uniformally have defined and interpreted the date of exportation to mean the date on which the particular merchandise in question actually leaves the country of exportation. The geographical designation, i.e., "country," is specifically used as distinguished from a port or ports therein. Thus, section 152.1(c) (19 CFR, 1976 ed.) of the Customs Regulations again defines the meaning of the date of exportation:

> (c) *Date of exportation.*—"Date of exportation," or the "time of exportation" referred to in section 402 and 402a, Tariff Act of 1930, as amended (19 U.S.C. 1401a and 1402), means the actual date the merchandise finally leaves the country of exportation for the United States. * * *

Prior judicial decisions likewise have uniformally construed the date of exportation to be that time the merchandise finally departs the country of exportation notwithstanding the number of ports therein from or through which the merchandise may have been transported and/or laded. The decision in the case of *Forman* v. *Peaslee*, 9 Fed. Cas. 452, 21 Law Rep. 273 (1857) has been followed consistently by our court and the appellate court in the determination of the date merchandise is deemed to be "exported" to the United States. *See also Avakian Bros., Inc.* v. *United States*, 41 CCPA

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[4] Exhibit B.—Defendant's cross-motion for summary judgment.

[5] 19 CFR 14.3(b) (1972 ed.)—

(b) The time of exportation referred to in sec. 402 and sec. 402a of the tariff act, as amended, is the date on which the merchandise actually leaves the country of exportation for the United States.[5] * * *

[5] If the merchandise is shipped directly by water from the country of export, the date of the sailing of the vessel is the date of exportation. Since the act of exportation is not complete until the merchandise finally leaves the jurisdiction of the exporting country, if a vessel with merchandise on board sails from two or more ports, or more than once from the same port, of the exporting country, whether or not stopping on the intervening voyage at a port of another jurisdiction, or if the merchandise is transshipped in another jurisdiction and subsequently re-enters the jurisdiction of the exporting country on another vessel, or if the merchandise is transshipped to another vessel in the same jurisdiction, the date the vessel on which the merchandise finally leaves the exporting country sails from the last port thereof is the date of exportation. * * *

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80, C.A.D. 532 (1953); *D.N. & E. Walter & Co.* v. *United States*, 42 CCPA 114, C.A.D. 582 (1955) and *United States* v. *Abell Forwarding Co., Inc.* (*Canada Atlantic Grain Export Co., Inc.*), 73 Treas. Dec. 1426, R.D. 4248 (1938).

It is true that the Customs regulations aforequoted as well as the court decisions determining the date of exportation of merchandise have related to the ultimate determination of the value of such merchandise under sections 402 and 402a of the Tariff Act of 1930, as amended. The reasoning of the courts therein, however, is equally applicable to and determinative of the date of exportation contained in Presidential Proclamation 4466 in the absence of accompanying language specifically indicating a construction otherwise.

In view of the foregoing, it is the opinion of the court that it cannot be presumed that the President in promulgating Proclamation No. 4466 intended the language thereof to be interpreted in conformity with the new-begotten and unrepeated construction of the date of exportation contained in the regulations and instructions of the Commissioner of Customs under date of September 3, 1971, to additional duty order No. 3. The plaintiff, therefore, having failed to rebut the presumption of correctness attaching to the determination of the District Director of Customs in the assessment of duty in connection with the merchandise in question in the instant action, the motion of the plaintiff for summary judgment is hereby denied, and the cross-motion of the defendant for summary judgment is granted.

Let judgment be entered accordingly.

(C.D. 4827)

INTERNATIONAL ARMAMENT CORPORATION, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Firearms and Accessories

Consolidated Court No. R69/9754

FOREIGN VALUE—FREELY OFFERED FOR SALE TO ALL PURCHASERS

Fundamentally, under section 402a(c) of the Tariff Act of 1930, as amended, there was no foreign value for the pistols in issue unless at the time of exportation they were freely offered for sale in the home market to all purchasers.

SAME—RESALE PRICE MAINTENANCE—CUSTOMER SELECTION

Resale price maintenance and customer selection practices pursued by the exporter in the home market in connection with the sale of its pistols preclude the existence of a foreign value, as defined in section 402a(c) of the Tariff Act of 1930, as amended, since the merchandise was not freely offered for sale to all purchasers as

required by the statute. *United States* v. *Philipp Wirth et al.*, 20 CCPA 94, T.D. 45705 (1932); *Berben Corporation* v. *United States*, 45 Cust. Ct. 482, R.D. 9785 (1960), *rev'd and rem'd*, 49 Cust. Ct. 497, A.R.D. 147 (1962), *on remand*, 51 Cust. Ct. 314, R.D. 10552 (1963). *Cf. Inter-Maritime Forwarding Co., Inc.* v. *United States*, 65 Cust. Ct. 814, A.R.D. 278, 318 F. Supp. 218 (1970), *aff'd*, 59 CCPA 84, C.A.D. 1044, 454 F. 2d 1197 (1972).

SAME—SUCH OR SIMILAR

An importer wishing to negate the existence of foreign value on the basis of a lack of a free market for the merchandise in the country of origin must establish that "similar" as well as "such" merchandise was not freely offered for sale in the home market during the relevant time period. *Nichols & Company, Inc.* v. *United States*, 59 CCPA 67, C.A.D. 1041, 454 F. 2d 1183 (1972).

"SIMILAR" MERCHANDISE—PISTOLS

The evidence establishes that the imported Walther pistols were different from other pistols sold in the home market of the Federal Republic of Germany (West Germany) in style, design, workmanship, and selling price, and possessed a unique double-action capability feature. In view of the uncontroverted uniqueness and distinguishing features of the Walther pistols as compared with other pistols sold in the home market, the court finds that other pistols sold in the home market were not "similar" to the Walther pistols within the purview of section 402a(c) of the Tariff Act of 1930, as amended. *Cf. B. A. McKenzie & Co., Inc., et al.* v. *United States*, 47 CCPA 143, C.A.D. 748 (1960). *H. J. Heinz Company* v. *United States*, 43 CCPA 128, C.A.D. 619 (1956) distinguished.

U.S. VALUE—NOT PRECLUDED BY GUN CONTROL LAWS

Plaintiff's restrictions on the sale of pistols in compliance with the gun control laws in the United States do not preclude the existence of U.S. value for the merchandise under section 402a(e) of the Tariff Act of 1930, as amended. *Cf. United States* v. *Getz Bros. & Co. et al.*, 55 CCPA 11, C.A.D. 927 (1967); *Magnolia Petroleum Company* v. *United States*, 54 Cust. Ct. 804, A.R.D. 188 (1965). *Berben Corporation* v. *United States*, *supra*, explained. *United States* v. *Graham & Zenger, Inc.*, 31 CCPA 131, C.A.D. 262 (1943) distinguished.

SAME—EXCISE TAX NOT DEDUCTIBLE FROM PRICE

Excise tax included in the price at which plaintiff sold imported pistols in the United States is not deductible from the price for purposes of calculating U.S. value under section 402a(e) of the Tariff Act of 1930, as amended. *Stoeger Arms Corp.* v. *United States*, 46 CCPA 59, C.A.D. 696 (1958); *John H. Faunce, Phila., Inc.* v. *United States*, 25 CCPA 131, T.D. 49245 (1937). *United States* v. *International Packers, Limited*, 48 CCPA 80, C.A.D. 769 (1961) distinguished.

SAME—MAXIMUM ALLOWANCES FOR GENERAL EXPENSES AND PROFIT ESTABLISHED

Plaintiff properly established the maximum 8-percent allowances for general expenses and profit in calculating U.S. values for imported pistols under section 402a(e) of the Tariff Act of 1930, as

amended, by proving that its average general expenses and profit for its entire line of firearms substantially exceeded the 8-percent maximum allowances, and then showing that the expenses and profit chargeable to the pistols in issue closely approximated the average figures calculated for its entire line. *Cf. United States* v. *E. H. Corrigan*, 36 Cust. Ct. 639, A.R.D. 67 (1956). *Hill Brown Corp.* v. *United States*, 54 CCPA 99, C.A.D. 917 (1967). *National Carloading Corp.* v. *United States*, 60 CCPA 54, C.A.D. 1080, 469 F. 2d 1398 (1972), and *Judson Sheldon International Corporation* v. *United States*, 51 Cust. Ct. 374, R.D. 10586 (1963), *aff'd*, 54 Cust. Ct. 773, A.R.D. 183 (1965) distinguished.

U.S. VALUE—STATUTE TO BE INTERPRETED LIBERALLY

It is well settled that the statutory provision covering U.S. value is to be interpreted liberally. *Hill Brown Corp.* v. *United States*, *supra*, at 103; *United States* v. *Robert Reiner, Inc.*, 35 CCPA 50, 59, C.A.D. 370 (1947).

VALUE—DUAL BURDEN OF PROOF

Plaintiff had the burden of not only proving that the appraisements were wrong, but additionally it had to establish the correct dutiable values. *Kobe Import Co.* v. *United States*, 42 CCPA 194, C.A.D. 593 (1955); *Brooks Paper Company* v. *United States*, 40 CCPA 38, C.A.D. 495 (1933).

U.S. VALUE—COST OF PRODUCTION

Since plaintiff failed to negate the existence of a U.S. value basis of appraisement pursuant to section 402a(e) of the Tariff Act of 1930, as amended, valuation on the residual cost of production basis under section 402a(f) is precluded. *United States* v. *Oscar E. Eggen* (*American Express Co.*) *et al.*, 55 CCPA 95, 97, C.A.D. 939 (1968).

EXPORT VALUE—PREFERRED STATUTORY BASIS OF APPRAISEMENT

Pursuant to section 402(a)(1)(3) of the Tariff Act of 1930, as amended, the preferred statutory basis for valuing imported merchandise is export value, as defined in section 402(b). *Jack Bryan, Inc.* v. *United States*, 80 Cust. Ct. 169, C.D. 4752 (1978); *The American Greiner Electronic, Inc.* v. *United States*, 79 Cust. Ct. 92, C.D. 4718, 441 F. Supp. 915 (1977).

SAME

Presumption of correctness attaching to the Government's appraisement on the basis of constructed value, as defined in section 402(d) of the Tariff Act of 1930, as amended, is overcome by proof of export value as defined in section 402(b) in light of the statutory preference of export value over constructed value.

EXPORT VALUE—"SELECTED PURCHASER"—SECTION 402(f)(1)(B)

Plaintiff who purchased imported merchandise on an exclusive distributorship basis was a "selected purchaser" within the ambit of section 402(f)(1)(B) of the Tariff Act of 1930, as amended.

SAME—PRICE FAIRLY REFLECTING MARKET VALUE

Export value, as defined in section 402(b) of the Tariff Act of 1930, as amended, may be established where there are sales to a

single selected purchaser if the price "fairly reflects the market value of the merchandise." Section 402(f)(1)(B) of the Tariff Act of 1930, as amended. In deciding whether such a showing has been made, consideration will be given to "whether the sales were at arm's length and the evidence showing the relationship between [the importer] and [the manufacturing exporter]." *D. H. Baldwin Co. and Koeller-Struss Co.* v. *United States*, 65 CCPA 67, 72, C.A.D. 1208, 577 F. 2d 704 (1978); *Spanexico, Inc.* v. *United States*, 64 CCPA 6, 10, C.A.D. 1176, 542 F. 2d 568, 571 (1976). In the instant case, the record establishes that the exporter and importer were wholly unrelated, and that the prices were established by arm's length negotiations. There is nothing in the record suggesting that the sale prices were in any manner contrived or rigged, or that the dealings between the exporter and importer were not bona fide in all respects. Under these circumstances, the court finds that the invoice prices fairly reflect the market value of the merchandise (accessories and air pistols) within the meaning of section 402(f)(1)(B) of the Tariff Act of 1930, as amended. *Cf. Ernest Lowenstein, Inc.* v. *United States*, 78 Cust. Ct. 169, R.D. 11779, 425 F. Supp. 856 (1977), *aff'd*, *United States* v. *Ernest Lowenstein, Inc.*, 80 Cust. Ct. 211, A.R.D. 325, 451 F. Supp. 988 (1978).

[Judgment in part for plaintiff.]

(Decided November 1, 1979)

Shaw, Pittman, Potts & Trowbridge, Esqs. (*Dean D. Aulick* and *Robert E. Zaler*, Esqs. of counsel) for the plaintiff.

Alice Daniel, Acting Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation, *John J. Mahon*, trial attorney, Esqs., for the defendant.

NEWMAN, Judge: Plaintiff, in this consolidated action, challenges the appraised values of certain pistols, accessories (holsters and magazines), and air pistols exported from the Federal Republic of Germany (West Germany) by the company of Carl Walther Sportwaffenfabric (Walther) in July and August 1968, and entered at the Port of Alexandria, Va.

The parties agree that the pistols (not including the air pistols) are on the final list published by the Secretary of the Treasury pursuant to section 6(a) of the Customs Simplification Act of 1956, T.D. 54521, and therefore valuation is governed by the provisions of section 402a of the Tariff Act of 1930, as amended (19 U.S.C. 1402). Further, it is undisputed that the other merchandise, viz, the accessories and air pistols, is not on the final list and accordingly appraisement of that merchandise is governed by the provisions of section 402 of the Tariff Act of 1930, as amended (19 U.S.C. 1401a).

The final list merchandise (pistols) was appraised on the basis of foreign value as defined in section 402a(c) while the other merchandise (accessories and air pistols) was appraised on the basis of constructed

value as defined in section 402(d). Respecting the final list merchandise, plaintiff contends that there are no foreign, export, or U.S. values as defined in section 402a (c), (d), and (e), and that cost of production as defined in section 402a(f) is the correct basis for appraisement. Alternatively, plaintiff claims U.S. values for certain of the pistols in issue. Plaintiff further claims that the accessories and air pistols are properly dutiable on the basis of export value as defined in section 402(b) of the Tariff Act of 1930, as amended.

Statutes Involved

Section 402 of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956 (19 U.S.C. 1401a):

> (a) Except as otherwise specifically provided for in this chapter, the value of imported merchandise for the purposes of this chapter shall be—
>
> (1) the export value, or
>
> (2) if the export value cannot be determined satisfactorily, then the U.S. value, or
>
> (3) if neither the export value nor the U.S. value can be determined satisfactorily, then the constructed value;
>
> except that, in the case of an imported article subject to a rate of duty based on the American selling price of a domestic article, such value shall be—
>
> (4) the American selling price of such domestic article.
>
> EXPORT VALUE
>
> (b) For the purposes of this section, the export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.
>
> * * * * * * *
>
> CONSTRUCTED VALUE
>
> (d) For the purposes of this section, the constructed value of imported merchandise shall be the sum of—
>
> (1) the cost of materials (exclusive of any internal tax applicable in the country of exportation directly to such materials or their disposition, but remitted or refunded upon the exportation of the article in the production of which such materials are used) and of fabrication or other processing of any kind employed in producing such or similar merchandise, at a time preceding the date of exportation of the merchandise undergoing appraisement which

would ordinarily permit the production of that particular merchandise in the ordinary course of business;

(2) an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise undergoing appraisement which are made by producers in the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for shipment to the United States; and

(3) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the merchandise undergoing appraisement in condition, packed ready for shipment to the United States.

* * * * * * *

DEFINITIONS

(f) For the purposes of this section—

(1) The term "freely sold, or in the absence of sales, offered for sale" means sold or, in the absence of sales, offered—

(A) to all purchasers at wholesale, or

(B) in the ordinary course of trade to one or more selected purchasers at wholesale at a price which fairly reflects the market value of the merchandise,

without restrictions as to the disposition or use of the merchandise by the purchaser, except restrictions as to such disposition or use which (i) are imposed or required by law, (ii) limit the price at which or the territory in which the merchandise may be resold, or (iii) do not substantially affect the value of the merchandise to usual purchasers at wholesale.

(2) The term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the merchandise undergoing appraisement, have been normal in the trade under consideration with respect to merchandise of the same class or kind as the merchandise undergoing appraisement.

(3) The term "purchasers at wholesale" means purchasers who buy in the usual wholesale quantities for industrial use or for resale otherwise than at retail; or, if there are no such purchasers, then all other purchasers for resale who buy in the usual wholesale quantities; or, if there are no purchasers in either of the foregoing categories, then all other purchasers who buy in the usual wholesale quantities.

(4) The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which export value, U.S. value, or constructed value, as the case may be, can be satisfactorily determined:

(A) The merchandise undergoing appraisement and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, the merchandise undergoing appraisement.

(B) Merchandise which is identical in physical characteristics with, and was produced by another person in the same country as, the merchandise undergoing appraisement.

(C) Merchandise (i) produced in the same country and by the same person as the merchandise undergoing appraisement, (ii) like the merchandise undergoing appraisement in component material or materials and in the purposes for which used, and (iii) approximately equal in commercial value to the merchandise undergoing appraisement.

(D) Merchandise which satisfies all the requirements of subdivision (C) except that it was produced by another person.

(5) The term "usual wholesale quantities," in any case in which the merchandise in respect of which value is being determined is sold in the market under consideration at different prices for different quantities, means the quantities in which such merchandise is there sold at the price or prices for one quantity in an aggregate volume which is greater than the aggregate volume sold at the price or prices for any other quantity.

* * * * * * *

Section 402a of the Act (19 U.S.C. 1402):

(a) For the purposes of this chapter the value of imported articles designated by the Secretary of the Treasury as provided for in section 6(a) of the Customs Simplification Act of 1956 shall be—

(1) The foreign value or the export value, whichever is higher;

(2) If the appraiser determines that neither the foreign value nor the export value can be satisfactorily ascertained, then the U.S. value;

(3) If the appraiser determines that neither the foreign value, the export value, nor the U.S. value can be satisfactorily ascertained, then the cost of production;

(4) In the case of an article with respect to which there is in effect under section 1336 of this title a rate of duty based upon the American selling price of a domestic article, then the American selling price of such article.

* * * * * * *

FOREIGN VALUE

(c) The foreign value of imported merchandise shall be the market value or the price at the time of exportation of such merchandise to the United States, at which such or similar merchandise is freely offered for sale for home consumption to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, including the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States.

EXPORT VALUE

(d) The export value of imported merchandise shall be the market value or the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States.

U.S. VALUE

(e) The U.S. value of imported merchandise shall be the price at which such or similar imported merchandise is freely offered for sale for domestic consumption, packed ready for delivery, in the principal market of the United States to all purchasers, at the time of exportation of the imported merchandise, in the usual wholesale quantities, and in the ordinary course of trade, with allowance made for duty, cost of transportation and insurance, and other necessary expenses from the place of shipment to the place of delivery, a commission not exceeding 6 per centum, if any has been paid or contracted to be paid on goods secured otherwise than by purchase, or profits not to exceed 8 per centum and a reasonable allowance for general expenses, not to exceed 8 per centum on purchased goods.

COST OF PRODUCTION

(f) For the purposes of this subtitle the cost of production of imported merchandise shall be the sum of—

(1) The cost of materials of, and of fabrication, manipulation, or other process employed in manufacturing or producing such or similar merchandise, at a time preceding the date of exportation of the particular merchandise under consideration which would ordinarily permit the manufacture or production of the particular merchandise under consideration in the usual course of business;

(2) The usual general expenses (not less than 10 per centum of such cost) in the case of such or similar merchandise;

(3) The cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the particular merchandise under consideration in condition, packed ready for shipment to the United States; and

(4) An addition for profit (not less than 8 per centum of the sum of the amounts found under paragraphs (1) and (2) of this subdivision) equal to the profit which ordinarily is added, in the case of merchandise of the same general character as the particular merchandise under consideration, by manufacturers or producers in the country of manufacture or production who are engaged in the production or manufacture of merchandise of the same class or kind.

* * * * * * *

The Record

Plaintiff introduced in evidence the oral testimony of three witnesses, three affidavits, the official entry papers and other documentary exhibits. Defendant submitted four reports of Customs representatives, a copy of a request for admissions served on plaintiff, and other documentary exhibits. The pertinent facts will be reviewed infra in connection with the discussion of the issues raised by the parties.

At trial, decision was reserved concerning defendant's objection to the admission into evidence of plaintiff's exhibit 12 for identification, which comprises a "Supplemental Response by Defendant to Interrogatories and Request for Production of Documents" (R. 97). Defendant's objection is sustained since, as correctly observed by defendant's counsel in his objection at the trial (R. 93–94), the supplemental response does not relate to the merchandise or time period involved in the present case.

Final List Merchandise (Pistols)

1

As heretofore mentioned, the pistols in issue (other than the air pistols) are on the final list and were appraised on the basis of foreign value, as defined in section 402a(c) of the Tariff Act of 1930, as amended. Plaintiff maintains that it has negated the applicability of foreign value for the pistols because in 1968 they were not freely offered for sale to all purchasers in West Germany. Fundamentally, under the statute, there was no foreign value for the pistols unless at the time of exportation they were freely offered for sale in the home market to all purchasers.

Plaintiff has advanced three restrictions on the sale of the pistols in question in support of its contention that they were not freely offered for sale to all purchasers in West Germany at the time of exportation. These restrictions are that Walther: (a) Pursued a program of resale price maintenance; (b) restricted sales to selected quality customers; and (c) restricted sales to persons holding the required West German firearms licenses or permits. In light of the issues raised by the foregoing asserted sales restrictions, plaintiff argues that the instant case "closely tracts" *Berben Corporation* v. *United States*, 45 Cust. Ct. 482, R.D. 9785 (1960), *rev'd and rem'd*, 49 Cust. Ct. 497, A.R.D. 147 (1962), *on remand*, 51 Cust. Ct. 314, R.D. 10552 (1963) (brief, pp. 4–5).

Defendant insists that plaintiff has failed to establish that the pistols were not freely offered for sale for home consumption to all purchasers. Additionally, defendant argues that even if a foreign value did not exist for the Walther pistols before the court, plaintiff failed to prove that foreign value did not exist for similar merchandise.

I have concluded that the record establishes the market restrictions asserted by plaintiff. Specifically, the restrictions on Walther's home market sales are established by the affidavits (and attached supporting documentation) of Carl Heinz Walther and Joachim Hertrampf, respectively the managing director and home market sales manager of the Walther company (exhibits 1 and 2). In substance, the affidavits of Messrs. Walther and Hertrampf show that during the pertinent period of time Walther pursued resale price maintenance practices and followed a policy of restricting its sales to selected quality customers; and that these policies extended to and restricted both the wholesale and retail levels of distribution. It further appears that the restrictive market practices were enforced to the extent of refusals to deal when necessary. These resale price maintenance and customer selection practices pursued by Walther clearly preclude the existence of a foreign value for the pistols, since the merchandise was not freely offered for sale to all purchasers as contended by plaintiff. *United States* v. *Philipp Wirth et al.*, 20 CCPA 94, T.D. 45705 (1932); *Berben, supra. Cf. Inter-Maritime Forwarding Co., Inc.* v. *United States*, 65 Cust. Ct. 814, A.R.D. 278, 318 F. Supp. 218 (1970), *aff'd*, 59 CCPA 84, C.A.D. 1044, 454 F. 2d 1197 (1972).

Defendant urges that the Walther and Hertrampf affidavits be disregarded, and that instead the Court rely upon the information contained in defendant's exhibit E, a Customs representative report. Exhibit E contains information obtained in 1972 from Mr. Peter Hoffmann, the then export manager of Walther, to the effect that the only restriction on Walther's sales in the home market was that Walther was required by West German law to sell only to licensed dealers.

In all candor, I can attach little weight to the report of Mr. Hoffmann's statements in defendant's exhibit E. There is nothing in that report showing that as export manager Hoffmann was knowledgeable concerning Walther's home market sales practices. It should be emphasized that Hertrampf, not Hoffmann, was the Walther official responsible for domestic sales in West Germany during the pertinent period of time. *Cf. Nichols & Company, Inc.* v. *United States*, 59 CCPA 67, 72, C.A.D. 1041, 454 F. 2d 1183 (1972). Significant too, is the fact that there is no indication in the report (exhibit E) that Hoffmann's statements related to Walther's sales practices during the pertinent period of time involved in this case, viz, July and August 1968. On its face, Hoffmann's statements as reported by the Customs representative relate to Walther's sales practices in 1971–72—a period not involved in the present case. However, it is noteworthy that in a Customs representative report dated September 9, 1976 (exhibit F), which covers the calendar year 1968, Mr. Hoffmann is reported by the representative as having stated that Walther administered a

price maintenance program. And in another Customs representative report dated October 2, 1978 (exhibit G), Hoffmann is reported to have stated that the price maintenance program and customer selection restriction were dropped by Walther in 1974 by virtue of a change in West German law, and the threat of lawsuits. Defendant's exhibits F and G, then, are consistent with and corroborate the Walther and Hertrampf affidavits on the issue of market restrictions.

Defendant also contends that the Walther affidavit, executed on February 13, 1978, should not be accorded any weight because the affidavit states (on p. 9) that "the books of account of Walther are available for inspection by the U.S. Customs authorities", but when on September 12, 1978, a Customs representative attempted to verify the cost of production data pertaining to July and August 1968 contained in the affidavit, he was informed that the records were no longer available (exhibit G). Although the destruction of the manufacturer's records covering the pertinent period of time in this case is indeed unfortunate in light of the pending litigation, nevertheless I see no reason on that basis for discrediting Walther's statement in his affidavit concerning the existence of market restrictions. Plainly, the company's cost records have no relevance to the issue of market restrictions.

Under all the facts and circumstances, I find that the Walther company during the pertinent period of time (July and August 1968) practiced resale price maintenance and customer selection at all sales levels, and conclude that as a matter of law such restrictive practices preclude the existence of a foreign value for the Walther pistols in issue.[1]

It remains to be determined, however, whether a foreign value existed for "similar" pistols.

An importer wishing to negate the existence of foreign value on the basis of a lack of a free market for the merchandise in the country of origin must establish that "similar" as well as "such" merchandise was not freely offered for sale in the home market during the relevant time period. *Nichols & Company, Inc.* v. *United States, supra.*

Respecting the application to firearms of the statutory term "similar", plaintiff cites *B. A. McKenzie & Co., Inc., et al.* v. *United States*, 47 CCPA 143, C.A.D. 748 (1960), which is obviously in point. There, the core question was whether certain rifles sold in Sweden were "similar" in the sense of the statute to certain other rifles which were exported to the United States from Sweden. The record showed

[1] Hence, it is unnecessary to further decide at this juncture whether the West German gun licensing requirements negate the existence of foreign value. Gun licensing restrictions were mentioned in *Berben, supra*, as one of the bases for the nonexistence of a foreign value for the involved pistols.

that both rifles were bolt-action, five-shot repeater sporting rifles of the Mauser type and shared other common features. However, the rifles differed in several important aspects. In determining that the rifles were not "similar" for appraisement purposes, our Appellate Court observed in *McKenzie* (id. at 147):

> At the outset of this discussion it must be remembered that we are dealing with items whose every feature is important to the particular sportsman. We shall first turn our attention to exhibit 2. Aside from the fact that exhibit 1 has a single trigger and exhibit 2 a double trigger, which difference has been explained to our satisfaction, and aside from the many similarities between them noted by the appellants' witnesses, an examination of these two rifles reveals some very significant differences. The stock of exhibit 1 is made of arctic beech and has an oil finish, while the stock of exhibit 2 is made of walnut and has a lacquer finish. The widths of the stocks are different, that of exhibit 1 being much wider and bulkier. The front and the rear sights are constructed differently. Exhibit 2 has an extended cheek rest while exhibit 1 is without this feature. The bolt handles are constructed differently. There are also obvious differences in the overall craftsmanship of the two rifles. Furthermore, no price or value has been established for the Brno rifle of exhibit 2 which fact is significant in and of itself.
>
> Although appellants' witnesses testified that the apparent difference in the length of the barrel and the caliber of the rifles would not affect their prices, these specific differences, as well as the other differences noted, are undoubtedly important to the individual sportsman and as such are significant in determining the question of commercial interchangeability, which is one of the factors to be considered in ascertaining whether the merchandise is similar within the purview of section 402(c). *Meadows, Wye & Co. (Inc.) et al.* v. *United States*, 17 CCPA 36, T.D. 43324; *United States* v. *Irving Massin & Bros.*, 16 Ct. Cust. Appls. 19, T.D. 42714.

See also: *United States* v. *Oscar E. Eggen (American Express Co.) et al.*, 55 CCPA 95, C.A.D. 939 (1968), citing *McKenzie, supra.*

Regarding the lack of similarity of Walther pistols to other pistols sold in the West German market, Mr. Walther states (exhibit 1, p. 1):

> * * * These products [Walther pistols] are unique and are different from the products of other German manufacturers in style, design, workmanship, and selling price. In addition to superior craftsmanship and distinctive styling, the key distinguishing characteristic of a Walther pistol is its double action capability—the pistol uniquely combines the advantages of the pistol (magazine loading, ease of handling and accurate shooting) with that of the revolver trigger (safety while loaded). The pistol, designed for self-protection, thus can be carried in complete safety while loaded, yet is ready for instant use. * * *

Hence, in addition to differences in style, design, workmanship, and selling price, the affiant emphasized what is described as a unique feature of Walther pistols—their double-action capability (safe while loaded, yet ready for instant use). Walther's statement respecting uniqueness is uncontradicted or rebutted by defendant's evidence.

Defendant relies on *H. J. Heinz Company* v. *United States*, 43 CCPA 128, C.A.D. 619 (1956) with respect to the issue of "similar" merchandise. *Heinz* presented the question of whether two different qualities or grades of tomato pulp were "similar" for purposes of appraisement on the basis of foreign value. Predicated upon the fact that the imported Heinz tomato pulp and the inferior English home consumption pulp were made of approximately the same materials and were adapted to the same uses, and were so used, the Court of Customs and Patent Appeals found that the two grades of tomato pulp were "similar" for purposes of foreign value appraisement.

Significantly, in *McKenzie*, the appellants relied heavily on *Heinz*, but on that score our Appellate Court responded (47 CCPA at 149):

> Although appellants rely mainly upon the *Heinz* decision to maintain their position, we find that case not to be sufficiently in point to be controlling here *because the factual situations are entirely different.* * * * [Italic added.]

Similarly, I find that defendant's reliance on *Heinz* is misplaced in the present litigation. In the case of tomato pulp, obviously such factors as style, design, and workmanship are not involved. More importantly, the advantages inherent in the Walther pistol's double-action capability gave that merchandise a uniqueness which alone militates against a finding of similarity to other pistols not possessing such feature.[2] The Heinz tomato pulp, on the other hand, possessed no analogous unique feature distinguishing it from the English home consumption tomato pulp.

In view of the uncontroverted uniqueness and distinguishing features of the Walther pistols as compared with other pistols sold in the West German home market, I find that other pistols sold in the home market were not "similar" to the Walther pistols within the purview of section 402a(c) as amended. Accordingly, plaintiff has sustained its burden of proving the nonexistence of a foreign value for "similar" as well as "such" merchandise, and has overcome the statutory presumption of correctness attaching to the appraisement of the final list merchandise.

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[2] Defendant stresses that in Walther's affidavit (exhibit 1, pp. 5-6), the affiant identifies four manufacturers of pistols in West Germany in 1968 other than Walther, and characterizes two of them as "main competitors". However, defendant overlooks that Walther identified the other pistol manufacturers concerning their *profit figures for cost of production* under sec. 402a(f). Under that section, the addition for profit relates to "merchandise of the same general character as the particular merchandise under consideration". Plainly, merchandise of the "same general character" may or may not be "similar" for purposes of sec. 402a.

2.

Inasmuch as the parties agree that export value as defined in section 402a(d) did not exist for the final list merchandise (pistols), we turn to the question of whether U.S. value as defined in section 402a(e) existed for that merchandise at the time of exportation.

Plaintiff argues that no U.S. value existed for the pistols because of the Federal, State, and local laws restricting the sale and possession of firearms and requiring licenses or permits.[3] The record shows that in compliance with the legal requirements concerning firearms licenses and permits imposed by the various levels of government, plaintiff restricted its sales of Walther pistols in the United States to U.S. citizens who had not been convicted of a major crime, who were not under indictment or fugitives, and who were 21 years of age or over.[4] Defendant, on the other hand, insists that gun control laws do not negate U.S. value. I agree with defendant's position.

In *Berben*, a gun licensing restriction under Italian law was one of the factors which Judge Richardson (writing for the third division, appellate term) noted had entered into plaintiff's customer selection practices. However, Judge Richardson's opinion is clear that it was the *arbitrary selection of particular customers by the seller* that was the decisive factor precluding the existence of a free market for the merchandise. See 49 Cust. Ct. at 501. Moreover, as pointed up by the defendant, a later decision by the Court of Customs and Patent Appeals in *United States* v. *Getz Bros. & Co. et al.*, 55 CCPA 11, C.A.D. 927 (1967), makes a definite distinction between restrictions predicated upon *governmental requirements*, such as licensing or quota limitations, as against restrictions based upon the *arbitrary marketing practices of a seller* which exclude certain purchasers or classes of purchasers from buying.

Thus, in *Getz* the appellate court addressed the question of whether an export quota and licensing system imposed by the Japanese Government so limited the class of buyers that plywood was not "freely offered" to all purchasers within the meaning of the statute. Concerning this phase of the case, the court stated (55 CCPA at 21–22):

> The appellant next urges that the appellate term erred in finding that the export quota system in Japan did not operate to limit

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[3] Plaintiff similarly argued that the licensing and permit requirements imposed under West German law so restricted the sale of the Walther pistols in West Germany as to preclude the existence of a foreign value. Since resale price maintenance and customer selection practices by the manufacturer sufficiently negated the existence of foreign value, it was unnecessary to decide whether the West German licensing requirement also precluded a foreign value for the pistols.

[4] Plaintiff's vice president and treasurer, Mr. William F. Slye, explained that since the States had varying age requirements, for purposes of simplicity in making sales in compliance with the laws, 21 years was adopted by plaintiff as the minimum age requirement as a matter of company policy (R. 37).

the class of buyers with the result that the plywood was not "freely offered" to all purchasers at the lower mill prices.

The applicable provisions of section 402a(d) and 402(b) of the tariff laws both require, in finding "export value," that the merchandise must be freely sold or offered for sale to all purchasers in the ordinary course of trade. These requirements, as used in section 402, have been interpreted to mean that the merchandise must be "freely sold" or "offered for sale" to "all those who cared to buy such goods in such market" in the ordinary course of trade. Moreover, the merchandise need not be freely offered to all purchasers without limitation, but rather "in the ordinary course of trade." *United States* v. *Nelson Bead Co.*, 42 CCPA 175, C.A.D. 590 (1955); *United States* v. *American Glanzstoff Corp.*, 24 CCPA 35, T.D. 48308 (1936).

Appellees' position is:

> The fact that the purchaser must comply with these export regulations imposed by the Japanese authorities under a quota system controlling the exportation of plywood from Japan in no way limits the free offering on the part of the manufacturers of their product to all who cared to purchase. It was the responsibility of the purchaser, be he an American or a Japanese trading house, to secure an export license from Japan under the existing quota system. * * *

In our view, requirements imposed by a sovereign which control the flow of goods from the country of the sovereign for a variety of reasons, do not prevent the lower court from finding that a free market existed. The existence of such a requirement does not defeat the concept of a "free offer" by the seller. Requirements such as quota limitations are clearly distinguishable from restrictions upon the free offering of merchandise imposed by the seller which arbitrarily exclude certain purchasers or classes of purchasers from buying from the seller. Rico, Inc. v. *United States*, 44 Cust. Ct. 788, A.R.D. 121 (1960), affirmed, 48 CCPA 110, C.A.D. 773 (1961). See *Pacific Wood Products Co.* v. *United States*, supra (export quota); *National Carloading Corp.* v. *United States*, supra (export quota); *United States* v. *International Commercial Co. and Armour & Co.*, 28 Cust. Ct. 629, Reap. Dec. 8112 (1952); and *F. W. Kuehne Co.* v. *United States*, 12 Cust. Ct. 386, Reap. Dec. 5985 (1944), affirmed *United States* v. *F. W. Kuehne Co.*, 14 Cust. Ct. 356, Reap. Dec. 6110 (1945). Compare *United States* v. *Graham & Zenger, Inc.*, 31 CCPA 131, 134, C.A.D. 262 (1943) (Belgian Government precluded purchaser from disposing of property for any use except home consumption); *United States* v. *Mexican Products Co.*, 28 CCPA 80, C.A.D. 129 (1940) (discounts allowed to purchaser by manufacturer dependent upon either the status of the purchaser or his bargaining ability); and *United States* v. *Glanzstoff Corp.*, supra (offer coupled with restriction that "loyalty discount" may be canceled by seller).

As this court stated in *Rico*, 48 CCPA at 112:

> * * * It would seem that to defeat the conception of a free offering the restriction would be one involving some form of

> marketing practice resulting in the *arbitrary exclusion* from the market of certain customers or classes of customers by a refusal to sell to them on an equal footing with others, or at all.
>
> On this basis, we thus conclude that, as a matter of law, substantial evidence appears in the record to support the finding of the lower court that such merchandise was "freely offered" within the meaning of the statute. [Italic added.]

The export quota and licensing system for plywood in *Getz* is analogous to the licensing requirements pertaining to firearms in that the marketing restriction is imposed by the sovereign for reasons of public policy, as contrasted to a marketing practice of a particular seller that arbitrarily excludes certain purchasers or classes of purchasers from buying from the seller. Furthermore, as observed by our appellate court in *Getz*, the merchandise need not be freely offered to all purchasers without limitation, but rather "in the ordinary course of trade." 55 CCPA at 21. Inasmuch as the restrictions arising out of gun control laws are applicable to all persons who deal in firearms, doing business in compliance with such laws obviously constitutes the "ordinary course of trade" for that industry. Significantly too, Mr. William F. Slye, plaintiff's vice president and treasurer, readily admitted on cross-examination that the regulation of firearm sales by the Government had no effect on plaintiff's selling prices for the merchandise in the United States, and the regulations had no effect on plaintiff's competitive position *vis-a-vis* other dealers or sellers of firearms in the United States (R. 62).

In addition to *Getz*, defendant has also called attention to *Magnolia Petroleum Company* v. *United States*, 53 Cust. Ct. 355, R.D. 10786 (1964), *aff'd*, 54 Cust. Ct. 804, A.R.D. 188 (1965). There, the trial judge held that the mere fact that purchasers of the merchandise involved had to obtain a license in order to make use of material produced by a patented process did not *ipso facto* create a controlled market in the legal sense. Similarly, in the present case the fact that plaintiff's customers were required to obtain gun licenses or permits is not inimical to a free offering of the merchandise as between seller and purchaser.

In addition to *Berben*, plaintiff relies on *United States* v. *Graham & Zenger, Inc.*, 31 CCPA 131, C.A.D. 262 (1943). There, the Government of Belgium precluded purchasers for home consumption from disposing of merchandise for any use except for home consumption. No issue was presented regarding the effect of gun control regulations or any form of licensing on the free offering of merchandise. Consequently, unlike *Getz*, *Graham* is not based on a factual situation analogous to that presented here.

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The short of the matter is that plaintiff has not negated the existence of U.S. value predicated upon its compliance with the gun control laws in the United States, as contended by defendant.

3.

The parties agree that there was no export value for the final list merchandise. Plaintiff contends that if the sales restrictions pursued by plaintiff (in compliance with the gun control laws) [5] do not negate U.S. value, then that basis of appraisement is proper for selected pistols, as set forth in plaintiff's exhibit 9 and appendixes D and E to plaintiff's brief. Defendant maintains that U.S. values exist for plaintiff's pistols, although such values have never been determined by the Customs Service in view of its appraisements on the basis of foreign value.

Plaintiff has advanced alternative U.S. values revolving around the question of whether excise tax levied on the sale of the pistols in the United States are a permissible deduction under section 402a(e). I have concluded that plaintiff has established its alternative claim for the U.S. values of selected pistols set forth in exhibit 9 and appendix D of plaintiff's brief, which values include the excise tax on the sale of the pistols in the United States. These values, which cover six selected pistols, are:

Pistol model nos.:	*U.S. values*
PPK 7.65 mm	$43.12
PPK 9 mm	43.12
PP 7.65 mm	43.12
P-38 9 mm polished	60.69
P-38 .22 lr	60.69
P-38 9 mm; matt	45.62

I agree with defendant that the decision of the Court of Customs and Patent Appeals in *Stoeger Arms Corp.* v. *United States*, 46 CCPA 59, C.A.D. 696 (1958) is dispositive of the excise tax issue. In *Stoeger Arms*, the appellate court held that under the old law (now section 402a(e)) an internal revenue tax imposed on the sale of rifles was included in computing U.S. value since the tax was part of the price at which the merchandise was "freely offered for sale for domestic consumption."

Plaintiff posits, however, that *Stoeger Arms* was erroneously decided by our appellate court in light of that court's subsequent decision in *United States* v. *International Packers, Limited*, 48 CCPA 80, C.A.D.

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[5] As previously observed, in compliance with the gun control laws, plaintiff restricted its sales to U.S. citizens who had not been convicted of a major crime, who were not under indictment or fugitives, and who were 21 years of age or over.

769 (1961). In the latter case, the appellate court held that the phrase "other necessary expenses from the place of shipment to the place of delivery" in the statutory definition of U.S. value should be so construed that U.S. value as determined thereunder will approximate a foreign value if one had existed. But in *International Packers* there was no dispute as to the price at which the merchandise was freely offered for sale for domestic consumption in the United States. The court emphasized that "the sole issue [in *International Packers*] is whether the exchange retention charge required by Argentina is within the statutory provision for deduction from the U.S. sales price of 'other necessary expenses from the place of shipment to the place of delivery'." (48 CCPA at 85.) Moreover, in *International Packers* the appellate court specifically noted and *distinguished Stoeger* on the ground that in the latter case it was interpreting a different term in the statute (viz, "price" rather than "necessary expenses". Accordingly, I am clear that there is no basis in *International Packers* which warrants departure from the court's prior holding in *Stoeger*.

Following the *Stoeger* decision, I hold that an excise tax, such as that applicable to the Walther pistols herein, is includable in U.S. value as part of the price of the merchandise. See also *John H. Faunce, Phila., Inc.* v. *United States*, 25 CCPA 131, T.D. 49245 (1937), which rejected the argument that an excise tax imposed in the United States on sale therein of the imported merchandise was properly allowable as a deduction in calculating U.S. value.[6]

Turning to plaintiff's other figures and computations entering into the calculation of the U.S. values for the selected pistols, defendant challenges only the allowances for general expenses and profit, and the other elements of U.S. value are not in dispute. Section 402a(e) provides for an allowance for profit not to exceed 8 per centum and a "reasonable allowance" for general expenses not to exceed 8 per centum. Plaintiff in computing U.S. values, deducted the maximum of 8 per centum for each category of allowance on the basis that the actual amounts for each exceeded 8 per centum. The sole question argued by the parties is whether plaintiff's method of computing general expenses and profit leads to the expenses and profit related to the imported merchandise.

On that aspect, plaintiff relies upon the testimony of Mr. Slye. In explaining how his company calculated its general and administrative expenses, Slye testified that plaintiff utilized its audit records (combined statement of plaintiff and its two subsidiaries) for the 6-month

[6] Plaintiff here argues that "to include excise tax in U.S. value continues to attribute to Congress an intent to place a tax on a tax without equitable justification". However, in *Stoeger*, the appellate court noted that the double taxation argument had been previously considered in *Faunce*, and rejected. Similarly, I see no merit to the double taxation argument in the present case.

period ending November 30, 1968, and arrived at an average general expense per weapon sold (R. 49, 74–75). This average figure is not disputed by defendant. With reference to this average figure for general and administrative expenses per firearm sold, Slye explained (R. 49):

> * * * Now, when you consider that every firearm that we handle has to be entered, warehoused, picked for orders, packed where necessary, invoiced, priced, handled by secretaries, from the paperwork, and by officers addressing themselves to it, we felt this was a very fair application of our G. & A. expense.

Mr. Slye further stated that since the average general expense per weapon exceeded the 8-percent maximum allowance, the maximum allowance was used. Slye also explained that the general expenses for the Walther products may have been a little less than the average figure because its surplus firearms line required a "little bit more handling" (R. 52).

With respect to profit, Slye testified that it was calculated at 12 to 13 percent of the sales price, or well in excess of the 8-percent maximum allowance, so that the 8-percent allowance was used (R. 51).

Defendant argues that plaintiff's method of calculating its general expenses was improper, since plaintiff utilized its average expenses relating to all the firearms sold, whereas only the expenses incidental to the sale of Walther or similar pistols are relevant. In support of its argument, defendant relies on *Hill Brown Corp.* v. *United States*, 54 CCPA 99, C.A.D 917 (1967) and *Judson Sheldon International Corporation* v. *United States*, 51 Cust. Ct. 374, R.D. 10586 (1963), *aff'd*, 54 Cust. Ct. 773, A.R.D. 183 (1965). And see *National Carloading Corp.* v. *United States*, 60 CCPA 54, C.A.D. 1080, 469 F. 2d 1398 (1972). Plaintiff concedes that under the foregoing cases it had the burden of proving the general expenses and profit chargeable to the imported merchandise, and that simply proving the average figures for all of plaintiff's firearms would not sustain that burden. In its reply brief (pp. 21–22) plaintiff articulates its contention as follows:

> The legal principles in this area are clear: Determining an average general expense for all product lines is indeed a permissible first step in determining general expense for the merchandise in issue. A plaintiff runs into trouble only if it stops at that point, and fails to correlate the company average to the imported merchandise. Thus, in both *Hill Brown* and *National Carloading*, plaintiffs made no attempt to establish such a correlation, and in both it lost on that basis. *Nat'l Carloading*, *supra*, at 1401. Where an importer has taken the second step by relating company average figures to the specific merchandise at issue, there has been no hesitancy to recognize the deductions as appropriate. *United States* v. *E. H. Corrigan*, 36 CCR 639, 647–48, ARD 67 (1956). [Footnote omitted.]

> In the instant proceeding, Interarms did not stop with the company average in its proof of general expense. Rather, it continued—as Defendant *totally* ignores—to correlate that average per unit sold to the Walther units, as described above. In so doing, Interarms specifically and directly—and without challenge—filled the void left by plaintiffs in *Hill Brown* and *National Carloading*, and fully satisfied the statutory proof requirements. [Italic in original.]

Slye's testimony establishes that the general expenses and profit chargeable to the Walther pistols were only slightly less than the average figures, which were appreciably in excess of the 8-percent maximum allowances. As explained by Slye, all firearms handled by plaintiff had to be entered, warehoused, picked for orders, packed where necessary, invoiced, priced, and processed by secretaries and officers of the companies (R. 49). Thus, plaintiff insists that proof of average general expenses and profit for all of the imported firearms is a permissible starting point in this case since plaintiff also correlated the average figures with the imported merchandise. On this score, plaintiff cites *United States* v. *E. H. Corrigan*, 36 Cust. Ct. 639, A.R.D. 67 (1956).

In *Corrigan*, a witness responsible for the sale of the merchandise in question testified that the general expenses of his firm were never less than 15 percent, and that the expenses in connection with merchandise in issue were greater than the usual general expenses of the firm. Here, Slye's testimony shows that the general expenses relating to the Walther products may have been "a little less" than the average expenses for all its firearms, but substantially exceeded the 8-percent maximum statutory allowance.

In the authorities relied on by defendant, the importers attempted to attribute a proportionate share of the total operating expenses of the companies to the imported merchandise, notwithstanding that the companies were engaged in several distinct kinds of business operations selling completely unrelated commodities that may have been susceptible to different percentages of general expenses and profits. By contrast, in the present case, plaintiff is engaged in a single business operation, viz, selling firearms, respecting which the record shows that plaintiff's personnel performed similar tasks. In this situation, it is reasonable to assume that the general expenses and profit chargeable to the Walther pistols closely approximated the average figures calculated for its entire line of firearms, which substantially exceeded the 8-percent maximum allowances.

It is well settled that the statutory provision covering U.S. value is to be interpreted liberally. *Hill Brown Corp.* v. *United States*, *supra*, at 103; *United States* v. *Robert Reiner, Inc.*, 35 CCPA 50, 59, C.A.D. 370 (1947). Under all the facts and circumstances, I conclude that plaintiff has sustained its burden of proving the proper allowances for general expenses and profit for the six selected pistols enumerated

above. However, for those pistols on the final list for which no evidence of U.S. values was submitted by plaintiff, the appraised values must be sustained. Plaintiff had the burden of not only proving that the appraisements were wrong, but additionally it had to establish the correct dutiable values. *Kobe Import Co.* v. *United States*, 42 CCPA 194, C.A.D. 593 (1955); *Brooks Paper Company* v. *United States*, 40 CCPA 38, C.A.D. 495 (1952). As mentioned, *supra*, plaintiff has failed to negate the existence of a U.S. value basis of appraisement. Accordingly, valuation on the residual cost of production basis, as claimed by plaintiff, is precluded. *United States* v. *Oscar E. Eggen*, *supra*.

NONFINAL LIST MERCHANDISE (ACCESSORIES AND AIR PISTOLS)

Finally, we consider the accessories and air pistols, which are not on the final list and were appraised on the basis of constructed value, as defined in section 402(d) of the Tariff Act of 1930 as amended. Pursuant to section 402(a)(1)(3) of the Tariff Act of 1930 as amended, the preferred statutory basis for valuing imported merchandise is export value, as defined in section 402(b). *Jack Bryan, Inc.* v. *United States*, 80 Cust. Ct. 169, C.D. 4752 (1978); *The American Greiner Electronic, Inc.* v. *United States*, 79 Cust. Ct. 92, C.D. 4718, 441 F. Supp. 915 (1977). Plaintiff claims that the nonfinal list merchandise should have been appraised at values represented by the invoice prices on the preferred export value basis. If plaintiff has established its claimed export values, the presumption of correctness attaching to the appraisement on the basis of constructed value is overcome in light of the statutory preference of export value over constructed value.

The appraised and claimed unit values (as set forth in appendix A, page 2, of plaintiff's brief) are:

	Appraised unit value	Claimed unit value
50 air pistols (LP 2)	$37.50	$30.24
1,000 leather holsters for Walther P–38 pistol	5.50	4.44
200 leather holsters for Walther PPK pistol	3.25	2.60
100 magazines for Walther TP 6.35 mm pistol	1.75	1.40
300 magazines for Walther PPK 7.65 mm pistol	2.88	2.32
100 magazines for Walther PP 7.65 mm pistol	2.88	2.32
100 magazines for Walther PP .22 lr pistol	3.63	2.92

Inasmuch as the merchandise was sold to plaintiff on an exclusive distributorship basis (R. 19, 54, 60, exhibit 1, para. 3), plaintiff was a "selected purchaser" within the purview of section 402(f)(1)(B).[7] With

[7] The "selected purchaser" provision in sec. 402(f)(1)(B) applies where the seller "*selects* one or more purchasers, restricting its sales to them and not selling or offering its merchandise for sale to all purchasers at wholesale". *Accto Chemical Co., Inc.* v. *United States*, 51 CCPA 121, 127, C.A.D. 846 (1964); *Judson Sheldon International Corporation, Island Woods International* v. *United States*, 67 Cust. Ct. 577, 580, A.R.D. 295, 331 F. Supp. 1293 (1971). Here it is undisputed that plaintiff was a "selected purchaser" within the purview of the statute.

reference to that section, Judge Miller, writing for the Court of Customs and Patent Appeals in *D. H. Baldwin Co. and Koeller-Struss Co.* v. *United States*, 65 CCPA 67, 72, C.A.D. 1208, 577 F. 2d 704 (1978), observed:

> * * * The language of section 402(f)(1)(B) [footnote omitted] indicates that Congress contemplated that an export value can be established for merchandise based on sales to a single selected purchaser if the price "fairly reflects the market value of the merchandise." As we said recently in *Spanexico, Inc.* v. *United States*, 64 CCPA 6, 10, C.A.D. 1176, 542 F. 2d 568, 571 (1976)—
>
> > Appellant does not deny that, as a selected purchaser of * * * [the manufacturing exporter], it was obliged to show that the price it paid for the imported merchandise fairly reflected market value. In deciding whether such a showing has been made, we consider whether the sales were at arm's length and the evidence showing the relationship between appellant and [the manufacturing exporter]. * * *
>
> *Accord, American Greiner Electronic, Inc.* v. *United States*, 79 Cust. Ct. 92, C.D. 4718, 441 F. Supp. 915 (1977); *National Carloading Corp.* v. *United States*, 57 Cust. Ct. 758, 759, A.R.D. 215 (1966).

Plaintiff urges—and I agree—it has established that the invoice unit prices fairly reflect the market value of the merchandise on the basis the record shows that the seller (Walther) and the purchaser (plaintiff) were wholly unrelated, and that the sale prices were reached by arm's-length negotiations and bargaining (see R. 54–55; exhibit 1, para. 3; exhibit E). By stark contrast, defendant has pointed to nothing in the record even remotely suggesting that the prices paid by plaintiff for the accessories and air pistols were in any manner contrived or rigged, or that the dealings between Walther and plaintiff were not at arm's length and bona fide in all respects. Therefore, I agree with plaintiff's contention that the invoice prices fairly reflect the market value of the nonfinal list merchandise within the meaning of section 402(f)(1)(B), and that export value is the proper basis for the appraisement of that merchandise. *Cf. Ernest Lowenstein, Inc.* v. *United States*, 78 Cust. Ct. 169, R.D. 11779, 425 F. Supp. 856 (1977), *aff'd, United States* v. *Ernest Lowenstein, Inc.*, 80 Cust. Ct. 211, A.R.D. 325, 451 F. Supp. 988 (1978).

Conclusion

To recapitulate:

(a) Foreign value as defined in section 402a(c) of the Tariff Act of 1930, as amended, was nonexistent for the Walther pistols during the relevant period of time in view of Walther's resale price maintenance and customer selection practices in the home market of West Germany.

(b) In 1968, no other pistols were sold in the home market that were "similar" to the Walther pistols within the meaning of section 402a (c), and accordingly there was no foreign value for "similar" merchandise.

(c) The parties agree that export value as defined in section 402a(d) did not exist for the final list merchandise.

(d) Plaintiff's argument that U.S. value as defined in section 402a(e) did not exist for the final list merchandise due to restrictions on the sale of the pistols pursuant to the gun control laws is without merit.

(e) Plaintiff's alternatively claimed U.S. values for selected pistols (including excise tax) are established by the record.

(f) Respecting those pistols for which no proof of U.S. values was adduced by plaintiff, the appraised values are sustained.

(g) Export value as defined in section 402(b) is the proper basis for appraisement of the accessories (holsters and magazines) and air pistols, and the export values are represented by the invoiced unit sales prices, as claimed by plaintiff.

Judgment will be entered accordingly.

(C.D. 4828)

AMERICAN POWERAIL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Electrical Apparatus

Court No. 77-2-00188

ELECTRICAL CONDUIT—POWER SOURCE FOR MACHINES—SEPARATE ENTITY—CHIEF USE

Powerails and accessories imported at Houston, Tex., from West Germany in 1976 and classified in liquidation under TSUS item 685.90 as modified by T.D. 68–9, the provision for apparatus to make, break, protect, or connect an electrical circuit, *Held*, not classifiable as parts of cranes under TSUS item 664.10 as modified by T.D. 68–9 as claimed by the importer, notwithstanding improper classification of some of the imported items under the electrical apparatus provision, where the sole function of the Powerail is to carry electric power to a machine (crane) from a stationary power source that furnishes energy to the machine and, as such, must be regarded as being *part* of the power source and not as *part* of the machine, *United States* v. *Janson Co.*, 16 Ct. Cust. Appls. 315, 320, T.D. 43075 (1928) cited, and no *prima facie* evidentiary showing has been made as to chief use of merchandise of the same class or kind as that imported.

[Dismissed.]

(Decided November 28, 1979)

Dabney, Garwood & Holland (*David C. Holland* at the trial and on the brief) for the plaintiff.

Alice Daniel, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Madeline B. Kuflik* at the trial and on the brief), for the defendant.

RICHARDSON, Judge: The merchandise at bar, described as accessories for Powerails, was exported from West Germany in December 1975, and classified in liquidation upon entry at Houston, Tex., under the provision in TSUS item 685.90 as modified by TD.. 68–9 for "other electrical apparatus for making or breaking electrical circuits, for the protection of electrical circuits, or for making connections to or in electrical circuits" at the duty rate of 8.5 *per centum ad valorem*. Plaintiff claims that the merchandise should be classified under the provision for parts of cranes in TSUS item 664.10 as modified by T.D. 68–9 at the duty rate of 5 *per centum ad valorem*.

The individual articles comprising the importation, as reflected on the invoice, consist of Powerail, end feed, line feed, end cap, sliding hanger, suspension bolt, collector, towing arm, and connecting pin. Erich Schneider, plaintiff's executive vice president who is in charge of buying, importing, marketing, and shipping of the product, and the sole witness in the case, described the importation as being a system "which supports a movable trolley which brings the current from an outside source from a terminal box to the crane, to the movable part of the crane. It therefore makes it movable." (R. 13) The witness stated that the imported product is "insulated and also completely enclosed." (R. 17)

The record shows that the Powerail is a polyvinyl chloride boxlike housing in lengths of approximately 6 to 12 feet which supports a maximum of five copper rails or conductors internally embedded in its sides and top to which electricity is introduced by means of an end feed or a line feed, as the case may be, connected to a stationary power source. The electrical current is transferred from the conductors to an internally mounted and movable collector trolley in constant contact with the conductors by means of spring-loaded brushes positioned in the trolley body. And from the trolley the current passes to an electrically powered overhead crane motor by means of a cable connection suspended at the Powerail from an arm of the sliding or rolling trolley which protrudes from a small aperture along the entire base of the Powerail. The Powerail is mounted in juxtaposition to the crane beam although not supported by the crane beam itself.

The record further shows that of 1 million linear feet of Powerail sold by plaintiff in the United States, approximately 1,800 linear footage, or less than 0.2 percent, has been used in applications other than overhead cranes. However, descriptive literature authored by plaintiff (exhibit A) and distributed to its customers and potential customers, indicates that the Powerail can also be used for safe, mobile, power feeding of hoists, monorail systems, electric power tools, textile

machines, machine tools, production lines, studio and station lighting systems, and many other applications. Moreover, the witness Schneider testified that there are other manufacturers in the United States of electrical systems that can be used for the same purposes as the Powerail, and that the plaintiff does not import or manufacture cranes.

At the conclusion of the trial, defendant moved to dismiss the action for failure on the part of plaintiff to establish a *prima facie* case. Decision was reserved by the court on the motion. And briefs were subsequently filed by the parties.

In its brief plaintiff argues that the Powerail is not includable under item 685.90 because, under the doctrine of *ejusdem generis*, the Powerail is not sufficiently similar to the articles specifically described in the provision to be included as apparatus for making or breaking electrical circuits. Plaintiff further argues that the chief use of the Powerail is as "part" of overhead cranes.

Defendant argues in its brief that the imported merchandise is specifically provided for in item 685.90. Defendant further argues that plaintiff has failed to establish that articles *of the same class or kind* as the imported merchandise were used as *parts* of cranes in the United States at or immediately prior to the date of importation.

Although the case was tried and briefed on the theory that the imported merchandise constitutes an electrical system, it is clear from the invoice before the court that the merchandise was imported as individual articles and not as a system *per se* (there is no question but that the ultimate use of the imported articles is in an electrical system). Inasmuch as imported merchandise must be classified in the condition in which it is imported, and not in a condition which reflects subsequent usage, *The American Import Co.* v. *United States*, 26 Cust. Ct. 361, Abs. 55248 (1951), it is apparent to the court that a number of the individual articles before the court were inappropriately grouped as part of an electrical system for classification purposes under circumstances which required preservation of their individuality for such purposes. See and compare *J. E. Bernard & Co., Inc.* v. *United States*, 59 Cust. Ct. 31, 36, C.D. 3060 (1967), treating a "valve clip used for retaining the tube in the receptacle" as a *support* article rather than as an electrical device.

Such is the case with respect to the nonelectric items of the importation, i.e., sliding hangers (referred to by the witness Schneider as steel stiffener clamps (TSUS item 657.20), suspension bolts (TSUS item 646.54) and towing arms (TSUS item 657.20), all of which are shown in exhibit 2 or in exhibit A. The same is true with respect to the nonelectric end caps of polyvinyl chloride composition, more appropriately classifiable, it would appear, as electric insulators of plastic under TSUS item 773.30. Item 685.90, under which these nonelectric articles were classified, does not address itself to electrical systems as

such. The provision covers specific electrical devices and components and parts thereof which are identified either by *eo nomine* designation or in terms of electrical function.

The remaining articles of the importation, namely, end feed, line feed, Powerail, copper connecting pins, and collectors, would appear to the court to readily respond to the tariff language "electrical apparatus for making * * * connections to or in electrical circuits" in item 685.90, except that, in the case of *insulated conductors*, such as the evidence shows the Powerail itself to be, Congress has shown a predilection for providing separately therefor under either TSUS item 688.04 or TSUS item 688.06, depending upon the weight of the copper content. In this respect, Congress seems to have elected to follow the format of the Brussels Nomenclature. See "Explanatory Notes to the Brussels Nomenclature (1955)," volume III, heading 85.19, page 961, heading 85.23, pages 968–969.

Although the court's view of the nature of the importations at bar tends to place it at odds with the resulting classification of the merchandise, at least in some respects, the view the court takes of the case makes it unnecessary for the court to resolve the case on the basis of the classification rendered. It is well settled that in a Customs classification case the plaintiff must not only prove that the classification is wrong, the plaintiff must also prove that its claimed classification is correct. *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970).

Applying this principle to the facts of this case, it is clear that defendant's motion must be granted as a matter of law. First, in the court's opinion, the Powerail and its accessories are no more a "part" of an overhead crane as claimed by plaintiff than a third rail in a subway system is "part" of the train. The Powerail, being wholly external to the crane, is nothing more than an electrical bridge between a stationary power source and an overhead traveling crane which utilizes its power to perform the motions of hoisting, trolley traversing, and bridging, which functions, the court is informed, may well be powered by hand, electricity, air, hydraulics, or a combination of these. See Baumeister & Marks, "Standard Handbook for Mechanical Engineers" (7th ed. 1967), section 10, page 37. Since electric power is not indispensable to the operation of an overhead crane, it follows that by no stretch of the imagination can it properly be said that the Powerail, whose only function is to carry electric power, is a part of the crane. *Cf. Ralph C. Coxhead Corp.* v. *United States*, 22 CCPA 96, T.D. 47080 (1934).

But even if electric power were indispensable to the operation of an overhead crane, the Powerail can only be regarded as being part of a separate entity, namely, the stationary power source, which *supplies* energy to a machine, and not as part of the machine that *receives* the energy. *United States* v. *Janson Co.*, 16 Ct. Cust. Appls. 315,

320, T.D. 43075 (1928). See also *Japan Import Co.* v. *United States*, 72 Treas. Dec. 490, T.D. 49224 (1937). Plaintiff's argument to the contrary simply fails to distinguish between an article whose presence is essential to *completion* of a crane and an article whose presence would be essential to *operation* of a crane. The Powerail, falling in the latter category, would comprise no part of a crane, and the court so holds.

Second, even assuming the Powerail to be "part" of an overhead crane, the question then arising from plaintiff's evidence would be whether such use has been shown to be the *chief use* of the part. And here, too, plaintiff's case must be found wanting as a matter of law.

Although the witness Schneider testified with respect to sales of the imported product in the United States, plaintiff presented no evidence relative to uses of other merchandise of this kind, notwithstanding the fact that the witness virtually conceded the existence of other merchandise of the same class or kind as that imported. Moreover, in its amended complaint [P7] plaintiff admitted that the Powerail was designed for "the utilization of electric current to transport mechanical *devices* along a restrictive path (overhead traveling cranes)" [italic added]—a posture which has been amply corroborated by evidence of a plurality of uses for the imported devices that plaintiff itself placed in the record in the form of a patent (exhibit 3). Thus, in view of the requirements of general interpretative rule 10(e) (i), TSUS,[1] the conclusion is inescapable that plaintiff has failed to establish *prima facie* the chief use of the class or kind of merchandise to which the imported merchandise belongs. See *Hawaiian Motor Company* v. *United States*, 82 Cust. Ct. 70, C.D. 4790, 473 F. Supp. 787, decided March 8, 1979 (*appeal pending*), and *United States* v. *Baltimore & Ohio R.R. Co. a/c United China & Glass Co.*, 47 CCPA 1, C.A.D. 719 (1959).

For the reasons stated, defendant's motion to dismiss is granted, without, however, affirming the classification of the merchandise.

Judgment will be entered herein accordingly.

(C.D. 4829)

JAMES A. ELKINS, JR., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Coral and Jade Carvings

Court No. 75-12-03129

EXPERT TESTIMONY—ANTIQUES

The testimony of plaintiff's expert witness persuaded the court that the imported coral and jade carvings were made prior to 100

[1] General interpretative rule 10(e) (i), TSUS, states: "A tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of articles of that class or kind to which the imported articles belong, and the controlling use is the chief use, i.e., the use which exceeds all other uses (if any) combined."

years before their date of entry and were therefore entitled to entry free of duty as antiques under item 766.25 of the TSUS.

[Judgment for plaintiff.]

(Decided December 13, 1979)

William Pannill for the plaintiff.

Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation, (*Susan C. Cassell* at the trial and on the brief), for the defendant.

WATSON, Judge: This action disputes the classification of three imported carvings, one from coral and two from jade. The coral carving, 5⅛ inches high, depicts a group of two ladies and a boy. One jade piece is a vase, 6¼ inches high, with carved flower decoration on the cover and body. The other jade piece, 8½ inches high, consists of four birds in an arboreal setting. The jade pieces originated from the People's Republic of China. All the items were imported from Singapore in 1974 and were classified under item 520.61[1] of the Tariff Schedules of the United States (TSUS) as other articles not specially provided for, of semiprecious stones. The coral piece was assessed with duty at the rate of 21 per centum ad valorem while the jade pieces bore the rate of 50 per centum ad valorem provided in column 2 of item 520.61.[2]

Plaintiff claims that these articles are entitled to entry free of duty as antiques made prior to 100 years before their date of entry under item 766.25[3] or alternatively as original sculptures under item 765.15[4] or original works of the free fine arts under item 765.25.[5]

Plaintiff's principal claim required it to prove that these articles

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[1] Schedule 5, part 1, subpart H:

	Precious and semiprecious stones, cut but not set, and suitable for use in the manufacture of jewelry:	
	• • • • • • •	
	Other precious and semiprecious stones, and articles not specially provided for, of such stones:	
	• • • • • • •	
520.61	Other	21% ad val. [and] 50% ad val.

[2] The col. 2 rates are applied in accordance with general headnote 3(e) of the TSUS, covering the products of certain Communist countries.

[3] Schedule 7, part 11, subpart B:

	Ethnographic objects made in traditional aboriginal styles and made at least 50 years prior to their date of entry; and other antiques made prior to 100 years before their date of entry; all the foregoing articles, including such articles which have been repaired or renovated without changing their original form or character:	
	• • • • • • •	
766.25	Other	Free

[4] Schedule 7, part 11, subpart A:

765.15	Original sculptures and statuary (including the first 10 castings, replicas, or reproductions made from a sculptor's original work or model with or without a change in scale and whether or not the sculptor is alive at the time the castings, replicas, or reproductions are completed), all the foregoing made in any form from any material as the professional productions of sculptors only, whether in round or in relief, and whether cut, carved, or otherwise wrought by hand or cast	Free

[5] Schedule 7, part 11, subpart A:

765.25	Original works of the free fine arts not provided for in the foregoing provisions of this part, in any media including, but not limited to, applied paper and other materials, manufactured or otherwise, such as are used on collages	Free

were made prior to 100 years before their date of entry. This issue was tried by a straightforward confrontation of expert testimony which made the matter a classic example of the case decided on the trial judge's evaluation of the testimony given before him. In this regard the court was most favorably impressed with the authoritative testimony of plaintiff's witness, Mr. Fong Chow, associate curator of Far Eastern art at the Metropolitan Museum of Art in New York. Both his credentials and substantive analysis of the articles were superior to those of defendant's witness who was Mr. Lowell Collins, an art teacher, art gallery owner and art appraiser. Although Mr. Collins' opinions were not lightly regarded, his grounding in oriental art was less than satisfactory to the court and his overall analysis was not persuasive. Mr. Chow's opinions were based on his analysis of the style and workmanship of the pieces and were arrived at following comparison of them with pieces in books, auction catalogs, and in the extensive collection of the Metropolitan Museum of Art. He dated the coral carving as "mid-19th century," the jade bird carving as late 18th to early 19th century and the jade vase as early 19th century.

Mr. Collins claimed to have found modern tool marks on the right hand of one of the coral ladies, marks which Mr. Chow did not see and which the court could not discern. The court was persuaded that certain modern tool marks on the jade bird carving were attributable to restorers employed to grind down the sharp broken tail of one of the birds.

Despite these marks, Mr. Chow's characterization and analysis of the entire piece was distinctly more persuasive. Mr. Collins claimed to have found modern tool marks on the lid of the jade vase. Mr. Chow explained those marks as part of a triangular stylized thunder pattern and the court believed his explanation.

For the above reasons, plaintiff proved by a preponderance of the evidence that these articles were made prior to 100 years before their date of entry. It is therefore unnecessary to reach its alternate claims, and judgment will enter accordingly.

(C.D. 4830)

CERTIFIED BLOOD DONOR SERVICES, INC., PLAINTIFF
v. UNITED STATES, DEFENDANT

Diagnostic Serum

Court No. 69/29877

STARE DECISIS

Imported serum used for diagnosis of blood disorders is properly classifiable as an "analogous biological product" under item 437.76

of the TSUS in accordance with the holding as to the same merchandise in *Certified Blood Donor Services, Inc.* v. *United States*, 62 CCPA 66, C.A.D. 1147, 511 F. 2d 572 (1975). Additional proof offered by defendant regarding whether or not the importations are subject to the licensing requirements of the Public Health Service does not bear on the meaning of the statutory term as interpreted by the CCPA and the normal rule of *stare decisis* should apply.

[Cross-motions for summary judgment; plaintiff's motion granted.]

(Decided December 14, 1979)

Sharretts, Paley, Carter & Blauvelt, P.C. (*Peter Jay Baskin* on the briefs) for the plaintiff.

Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Madeline B. Cohen* on the brief), for the defendant.

OPINION AND ORDER

WATSON, Judge: These are cross-motions for summary judgment in a dispute regarding the classification of imported serum used for the diagnosis of human blood disorders. The imported merchandise is the same in all material respects as the merchandise involved in *Certified Blood Donor Services, Inc.* v. *United States*, 62 CCPA 66, C.A.D. 1147, 511 F. 2d 572 (1975). It was classified under the ultimate residual provision of item 799.00[1] of the Tariff Schedules of the United States (TSUS).

In the previous action the principal question was the correctness of plaintiff's claim that item 437.76[2] of the TSUS, providing *inter alia* for "analogous biological products," described serums used for *diagnostic* purposes. The Court of Customs and Patent Appeals decided that it did. The issue was decided by reference to the "Tariff Classification Study Explanatory and Background Materials," November 15, 1960, schedule 4, part 3, page 86. The CCPA stated as follows:

> * * * That passage clearly demonstrates that the scope of item 437.76 was intended to "substantially correspond with the scope of the licensing requirements of the Public Health Service * * * applicable to the importation of certain biological products." [62 CCPA at 70.]

The CCPA went on to state as follows:

> These Public Health Service regulations broadly define the phrase "applicable to the prevention, treatment or cure of diseases

[1] Schedule 7, part 14—Nonenumerated products:
Any article, not provided for elsewhere in these schedules:

799.00	Other	9% ad val.

[2] Schedule 4, part 3—Drugs and related products; subpart B:

437.76	Viruses, therapeutic serums, vaccines, toxins, antitoxins, and analogous biological products * * *	Free.

> or injuries of man" as "including also any other use for purposes of diagnosis if the diagnostic substance so used is prepared from or with the aid of a biologic product." * * * [*Id.* at 71.]

The term "biological product" was defined in 42 CFR 73.1 (1960) to include serums used for purposes of diagnosis. This led the CCPA to conclude that the proper classification of the imported merchandise was in item 437.76 of the TSUS as analogous biological products.

Plaintiff's motion for summary judgment is clearly meritorious and it remains only to comment on defendant's cross-motion and on its argument against the normal application of the rule of *stare decisis*.

In its opposition and cross-motion, the Government has concentrated its attention on proving that these importations did not have, and were not required to have, licenses under the Public Health Services Act. The Government argues that no *stare decisis* effect should be given to the CCPA decision because it erred as follows:

> There was no finding by the court that either the merchandise itself was licensed or that the manufacturer's establishment was licensed. Therefore, the court could not find that the merchandise or manufacturing establishment substantially corresponded with the scope of the licensing requirements of the Public Health Service as mandated by the legislative history.

It is the opinion of this court that *stare decisis* should be given full force and effect and the licensing considerations raised by the defendant are irrelevant to the classification of the merchandise. The classification of these importations is to be arrived at by the interpretation of the language of the TSUS and not by considerations of whether the importations do or do not require licenses pursuant to other legislation or regulations. The purpose of resorting to the Public Health Service regulation was as an aid in defining the statutory term "analogous biological products" and the clear meaning of the CCPA opinion is that it was arriving at a definition of the term "analogous biological product." That definition includes products used for diagnosis because the legislative history shows that the term was intended to be understood in conformity with the meaning of the term "biological products" in the licensing requirements of the Public Health Service. The TSUS language was not intended to be limited in its application to articles which require licenses.

Admittedly, the trial court and the CCPA did give some attention to a stipulation between the parties regarding the license status of the importations but the significance of that attention is not apparent. It suffices to say that the opinion of the CCPA does not indicate that the existence or nonexistence of a license for a particular importation enters into the determination of whether it is an "analogous biological product" within the meaning of item 437.76 of the TSUS.

In the opinion of this court once the TSUS term has been defined through whatever means and with whatever aids, the effect of the

interpretive aids such as the licensing provisions of the Public Health Service regulations does not extend to further modify the application of the statutory term under the TSUS.

For the above reasons it is

ORDERED, ADJUDGED, AND DECREED, that plaintiff's motion for summary judgment be, and the same hereby is, granted; and it is further

ORDERED, ADJUDGED AND DECREED, that the diagnostic serum covered by the above-captioned action is properly classifiable as an analogous biological product under item 437.76, TSUS, free of duty; and it is further

ORDERED, ADJUDGED AND DECREED, that the Regional Commissioner of Customs at the Port of New York shall reliquidate the entry accordingly; and it is further

ORDERED, ADJUDGED AND DECREED, that defendant's cross-motion for summary judgment be, and the same hereby is, denied.

(C.D. 4831)

THE KINNEY CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Metal flats

Court No. 77-4-00573

UNFINISHED PARTS

Unfinished metal flats were properly classified as parts of jewelry. The fact that they were subjected to processing after importation did not mean that they were not already parts as imported. Since the processing brought already advanced importations to the same final state of readiness without distinguishing between them, proof that final articles were chiefly used as parts of jewelry was equivalent to proof that the importations were so used. General Interpretative Rule 10(h) employed.

[Cross-motions for summary judgment; defendant's motion granted.]

(Decided December 14, 1979)

Doherty and Melahn (*Robert Emmett Mullin, Jr.*, on the briefs) for the plaintiff.
Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Susan C. Cassell* on the briefs) for the defendant.

OPINION AND ORDER

WATSON, Judge: This dispute is before the court on cross-motions for summary judgment. The merchandise in question consists of two types of flat metal pieces with enamel decoration, referred to as

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"flats." One is called the "Key-Shaped Mittersill" and the other is called the "Liberty Bell." The Mittersill flat is roughly in the shape of a key blank 1¼ inches in length and one-half inch in width. It has on its face the name of the purchaser in script, a resort known as Mittersill, and the emblem of the resort, both on a white enamel background. The Liberty Bell flat is in the familiar shape of the Liberty Bell and is decorated in the colors of red, white, and blue. It measures three-quarters of an inch in length and slightly less than three-quarters of an inch in width.

The merchandise was imported from Taiwan and entered by mail at the port of Providence, R.I. It was classified under item 740.38[1] of the Tariff Schedules of the United States (TSUS) as parts of jewelry and assessed with duty at the rate of 27.5 per centum ad valorem. It is claimed that the merchandise is properly classifiable under item 657.30[2] of the TSUS as articles of copper, not coated or plated with precious metal, and dutiable at the rate of 0.6 cent per pound plus 11 per centum ad valorem.

The essential facts of the case are not in dispute although they have been the subject of some caviling between the parties. After removing the cavils and deleting those matters which are more in the nature of legal conclusions, the material facts in the case, based on the court's understanding of the record herein, are as follows:

1. The merchandise at issue in its condition as imported consists of metal flats with enamel decoration.

2. The merchandise is not used in its imported condition.

3. After importation and prior to sale the merchandise is subjected to additional processing.

4. After processing the merchandise is used for jewelry and non-jewelry uses.

Plaintiff relies on its presentation of representative samples of the importations and the affidavit of plaintiff's president to establish that the merchandise in question is not a part and is in chief value of copper. Plaintiff argues that in its condition as imported the merchandise is insufficiently advanced to be a part of jewelry and has equal potential to be used in both jewelry and nonjewelry items.

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[1] Schedule 7, part 6, subpart A:
Jewelry and other objects of personal adornment not provided for in the foregoing provisions of this part (except articles excluded by headnote 3 of this part), and parts thereof:

* * * * * * *

Valued over 20 cents per dozen pieces or parts:

* * * * * * *

740.38 Other ..... 27.5% ad val.

[2] Plaintiff also made claims under items 654.05 and 657.35 but only the 657.30 claim was argued.
Schedule 6, part 3, subpart G:
Articles of copper, not coated or plated with precious metal:
657.30 Of copper, other than alloys of copper; of nickle silver or of cupro-nickel... 0.6¢ per lb.+ 11% ad val.

Defendant relies on the presumptive correctness of its classification and on plaintiff's response to interrogatory No. 12(b) that "after manufacture, the chief use of the Mittersill flat and similar merchandise is as jewlery."

Plaintiff's argument that the importations are not sufficiently advanced to be parts is ingenuous. They are clearly much too developed in form and in detail and too close to the final product to be considered mere material. While it is true that in their condition as imported they have the potential to be ultimately used for a variety of jewelry and nonjewelry uses, this "potential" is not reduced by their further advancement. When they are finally finished they have the same potential for alternative uses, and it is only the final act of attachment to specific items which "seals" their use. In other words, it might be an argument against determining the chief use in their unfinished state if further processing would create distinctions between those which would become parts of one type and those which would become parts of another type. See, for example, the treatment of amberoid shapes in *United States* v. *National Importing Co. (Inc.) et al.*, 12 Ct. Cust. Appls. 186, T.D. 40169 (1924). Here the further processing does not develop any distinction between the unfinished objects but simply brings them all into the same undifferentiated state of readiness for use. Therefore, the processing or advancement, being the same for all the objects, can be eliminated from the "equation" and it can be reasoned that the chief use of the unfinished object is the same as that of the finished object.

The implications of plaintiff's argument that these objects have no use at all in their imported condition would disrupt a basic statutory arrangement. If that reasoning were followed, no unfinished article could be classified in the provision for the finished article since it could always be argued that articles have no use in their unfinished state. Yet it is clear from general interpretative rule 10(h)[3] that the tariff schedules contemplate that articles whose finished form can be definitely discerned are described by the provision for the finished article even if they are unfinished.

Plaintiff makes a related argument that what was done here violated the principle that articles are to be classified in accordance with their condition as imported in that the chief use attributed to them does not become manifest until they are in finished form. However, this is based either on the assertion that the importations have no use in

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[3] TSUS general headnotes and rules of interpretation:

10. *General interpretative rules.*—For the purposes of these schedules—

• • • • • • •

(h) unless the context requires otherwise, a tariff description for an article covers such article, whether assembled or not assembled, and whether finished or not finished;

their imported condition, which is a groundless fiction, or on the assumption that they have a multiplicity of potential uses which are not determinable except as processing directs them one way or the other. As discussed earlier, plaintiff has not proved that the processing does anything to differentiate between these importations and therefore it is reasonable and correct to consider that their uses do not vary according to their condition. Consequently, they were classified in accordance with their condition as imported at which time the chief use could logically be ascertained.

For the same reason, although technically the answer to defendant's interrogatory 12(b) spoke of chief use after "manufacture," because the processing of the importations finished them in a uniform manner without developing use differentiations between them, it is logical to reason from the answer that absent intervening changes the chief use of the importations after "manufacture" must be the chief use at the time of importation. Accordingly, the answer is either an admission or proof by logical extension of the fact that the importations are chiefly used in jewelry. The defendant's cross-motion for summary judgment must therefore be granted, and it is hereby

ORDERED, ADJUDGED AND DECREED, that plaintiff's motion for summary judgment be, and the same hereby is, denied in all respects; and it is further

ORDERED, ADJUDGED AND DECREED, that defendant's cross-motion for summary judgment be, and the same hereby is, granted in all respects; and it is further

ORDERED, ADJUDGED AND DECREED, that judgment be, and hereby is, entered affirming the Customs classification of the imported merchandise under item 740.38, TSUS, and the assessment of duty thereunder at the rate of 27.5 per centum ad valorem. The action is accordingly dismissed.

(C.D. 4832)

EDGE IMPORT CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Hunting Knives—Knives With Stag Handles—Knives With Wood Handles—Other

Court No. 75–8–02155

Imported knives with metal pommels and metal guards containing stag horn or wood in their handles which were classified by Customs as knives, other; other, under TSUS item 650.21, as modified by T.D. 68–9, were claimed by plaintiff to be properly classifiable as knives with stag horn or wood in their handles under TSUS item 650.13 or 650.19, respectively, as modified. HELD, properly

classified by Customs as knives, other; other, under item 650.21, as modified.

CLASSIFICATION—HUNTING KNIVES WITH METAL POMMELS AND METAL GUARDS

Knives with metal pommels and metal guards may not be classified as knives with wood or stag handles because of their metal elements.

CLASSIFICATION—TRADE MEANING

Even assuming imported merchandise is known in the trade as wood-handled or stag-handled knives, this is not necessarily determinative of its classification. *United States* v. *Ignaz Strauss & Co., Inc.*, 37 CCPA 32, 35, C.A.D. 415 (1949). *See also Hancock Gross, Inc.* v. *United States*, 73 Cust. Ct. 72, C.D. 4555, 383 F. Supp. 832 (1974), *aff'd*, 62 CCPA 100, C.A.D. 1153, 517 F. 2d 951 (1975).

EVIDENCE—BURDEN OF PROOF

Plaintiffs in this court bear a burden of proof to demonstrate the incorrectness of the Customs Service's classification and to establish the propriety of their asserted classification, whether primary or alternative. *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970). Plaintiff has failed to meet that burden here.

[Judgment for defendant.]

(Decided December 17, 1979)

Greenwald, Korner & Goldsmith (*Frank J. Hariton* at the trial; *Leo Goldsmith, Jr.*, on the briefs) for the plaintiff.

Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Susan Handler-Menahem* at the trial and on the brief), for the defendant.

LANDIS, Judge: This case involves the importation of hunting knives exported from Germany and entered at New York in 1973 and 1974. The prior opinion of this court, C.R.D. 79–7, denying defendant's motion to strike portions of plaintiff's brief, appears in 82 Cust. Ct. 343.

The Customs Service heretofore classified the imported knives under TSUS item 650.21, as modified by T.D. 68–9, and assessed duty thereon at the rate of 0.5 cent each plus 8.5 per centum ad valorem. Plaintiff in its complaint claims that those knives which contain stag horn in their handles are properly classifiable under TSUS item 650.13, as modified by T.D. 68–9, and dutiable at the rate of 2 cents each plus 6 per centum ad valorem. Plaintiff further claims that those knives which contain wood in their handles are properly classifiable under TSUS item 650.19, as modified by T.D. 68–9, and dutiable at the rate

of 1 cent each plus 6 per centum ad valorem. Finally, plaintiff alternatively claims that prior Customs practice requires a result in its favor.

For the reasons stated below, it is the determination of the court that the classification relied upon by the defendant shall prevail.

The pertinent provisions of the tariff schedules, as modified by T.D. 68–9, are as follows:

SCHEDULE 6. – METALS AND METAL PRODUCTS

PART 3. – METAL PRODUCTS

* * * * * * *

Subpart E. – Tools, Cutlery, Forks and Spoons

* * * * * * *

	Knives not specifically provided for elsewhere in this subpart, and cleavers, with or without their handles:	
	* * * * * * *	
	Knives with their handles:	
	* * * * * * *	
650.13	With animal horn, bone, ivory, mother-of-pearl, or shell handles	2¢ each + 6% ad val.
	* * * * * * *	
	Other:	
650.19	Hunting knives with wood handles	1¢ each + 6% ad val.
650.21	Other	0.5¢ each + 8.5% ad val.

In this case there is the question of whether a knife, containing a *metal* guard and *metal* pommel may be classified as a stag-handled knife or a wood-handled knife. This raises the issue of whether a guard and pommel are part of the handle of a knife. (The guard of a knife is that horizontal piece which separates the blade from the remainder of the handle. The pommel is at the very end of the knife. The guard is largely a safety feature while the pommel has esthetic value and also occasionally holds the knife together.) A subsidiary question plaintiff has made reference to is whether prior classification by the Customs Service bars the classification made herein.

Two witnesses were offered by plaintiff and one by defendant. Plaintiff's witnesses, however, were ineffective and not particularly persuasive.

Plaintiff's first witness was Mr. Tom Palmer, who for 7 years was vice president of Gutman Cutlery Co. (the parent of plaintiff). He was involved in sales and purchasing for the company with "special emphasis on product design" (R. 4).

Mr. Palmer stated he agreed with Webster's Seventh New Collegiate Dictionary's definition of handle—"a part that is designed to be grasped by the hand" (R. 8). Mr. Palmer further stated, in the major portion of his testimony, that in the knife trade the exhibits in the case would be known as stag-handled or wood-handled knives. (See, e.g., R. 7, 23.) This was because the portion that was held was either wood or stag. However, on cross-examination, counsel for the defendant brought out that Palmer, while demonstrating how a knife is held, also had his hand, more particularly his thumb, wrapped around the metal guard as well (R. 49–50). Thus the guard would appear to be a segment of the handle. Nevertheless, Palmer stated that manufacturers, distributors, and consumers referred to the importations as stag-handled or wood-handled knives. This opinion was largely endorsed by numerous knife catalogs introduced by the plaintiff. However, even if the imported merchandise is known in the trade as wood-handled or stag-handled knives, this is not necessarily determinative of its tariff classification. *United States* v. *Ignaz Strauss & Co., Inc.*, 37 CCPA 32, 35, C.A.D. 415 (1949). *See also Hancock Gross, Inc.* v. *United States*, 73 Cust. Ct. 72, C.D. 4555, 383 F. Supp. 832 (1974), *aff'd*, 62 CCPA 100, C.A.D. 1153, 517 F. 2d 951 (1975).

Plaintiff's second witness was Mr. Ivan Szanto, the general manager of Gutman Cutlery (parent of plaintiff). Mr. Szanto testified that while he could imagine a knife with no metal whatsoever from the end of the blade to the end of the knife, such a knife would not be a quality knife (R. 65). Furthermore, he never saw a guard made out of wood, although he conceded that such a construction may not be impossible (R. 66). Finally, "the pommel is always made out of metal" (R. 67). On cross-examination though, Mr. Szanto identified high-quality knives, marked hunting knives (catalog, exhibit A), which contain wood in their handles and have no guards or pommels of metal. In another catalog exhibit (exhibit C, Gutman's own cutlery) proffered by the defendant, the witness, however, identified a knife with a stag handle which has no metal guard or pommel (R. 79). Thus, such a knife is clearly possible.

Apparently in an effort to introduce a de minimis argument, i.e., that the metal in a knife pommel and guard is de minimis when compared to the handle as a whole, Szanto testified that the guard is never more than 3 percent of the value of the knife (R. 77). Yet doubt was cast on this figure on cross-examination (R. 80).

It should be noted that nowhere in the record are any of the exhibits identified as being the same as the imported merchandise. This should have been done by plaintiff, if that is true.

The defendant's witness was Mr. R. N. Farquharson, executive vice president and chief operations officer of Case Cutlery Co. Case

Cutlery manufactures pocketknives, hunting knives, scissors, and shears, and markets them around the world (R. 84). The company also has prepared knives for the military, and for the space program, (R. 85). The company has been making knives since 1947 (R. 91). Mr. Farquharson has been with Case since 1955 (R. 84). As executive vice president and chief operations officer, since 1973, Mr. Farquharson has been in charge of all the operations of the company (R. 85). Mr. Farquharson at the time of trial was president emeritus of the American Cutlery Manufacturers Association after having served 2 years as president. He has been quoted in books and articles on knives and through the years has frequently attended trade shows (R. 86).

According to this experienced witness, "[a] knife is made of two major parts, the blade and the handle. The handle is composed of an assembly, normally, of three parts: The cover material, the guard, and the bolster" (R. 87). He stated: "It's not a knife without a handle and without a blade" (R. 88). Some more of his testimony is worthwhile excerpting here:

> Q. What is the purpose of the guard?—A. It's a safety feature. As you have heard testimony earlier today, to guard the individual's hand from slipping over the cutting edge.
>
> Q. Why does a guard become necessary in a hunting knife?—A. From a safety feature, it protects the user from hurting himself.
>
> Q. Why is there more of a likelihood in a hunting knife that a person's hand would slip?—A. Well, you are gutting an animal. Your hand gets slippery and moist and you might not be able to hold the knife firmly enough, and one puts on guards to keep your hand from sliding forward, and a guard on the end of the knife to keep it from sliding off.
>
> Q. And both the back pommel and the guard serve to protect the hand?—A. Yes, that's why it's shaped that way (R. 88–89).

In other knives, where the handles are made by using washers, the pommel locks the washers in place. "(The pommel) is used to keep the whole handle tgether" (R. 89).

The defendant's position in this case is that since these elements of the handle, the guard and the pommel, are made of metal, one may not refer to the completed object as a stag-handled or wood-handled knife since important segments of them are made of metal. One of plaintiff's counterarguments is that the TSUS provision for stag-handled or wood-handled knives, under such an understanding as outlined above, would be devoid of meaning since there never would be such an item as a completely stag-handled or wood-handled knife. Yet Mr. Farquharson's testimony belies this argument:

> Q. Was there a time historically when guards and pommels were all made from the covering material?—A. Oh, yes. They still are in some instances (R. 90).

This is even supported by one of plaintiff's witnesses. See testimony under cross-examination at pages 78–79 of the record.

The critical point of Farquharson's testimony therefore is that a knife consisting of a metal guard and pommel cannot be classified as a stag-handled or wood-handled knife even though the knife's covering is made of those materials. That is the holding of this case.

On cross-examination, Farquharson was forced to admit, repeatedly, that various catalogs identified such knives as leather-handled knives, or stag-handled knives, despite the presence of metal guards and pommels. He was able to extricate himself, on redirect examination, by pointing out that these knives were categorized according to their cover material, for ease in marketing. This was persuasive. Plaintiff's witnesses were not as effective nor as persuasive.

The case most closely on point is *United States* v. *Charberjoy Distributors, Inc.*, 59 CCPA 207, C.A.D. 1068, 465 F. 2d 922 (1972), which involved the importation of table knives from Japan. The handles of the merchandise were composed of stainless steel and plastic. The knives were classified as knives "with stainless steel handles" under TSUS item 927.53. Yet the court held that since the knife handles were composed of stainless steel and plastic, the proper classification was under TSUS item 650.21, for "other" knives.

The Court of Customs and Patent Appeals approvingly cited the Customs Court:

> With respect to identity of merchandise covered by item 927.53 classification, the evidence in this record clearly shows that the imported knives possess handles which are composed in substantial part of a nonmetallic material, a plastic. Item 927.53, the temporary provision, and items 650.09 and 650.11, the permanent provisions to which item 927.53 refers, all contain the qualifying phrase "with stainless steel handles." This latter phrase we think is incompatible with a description of a knife "with stainless steel and plastic handle"—the characterization most accurately identifying the knife handles at bar, according to the evidence. And we find nothing in the tariff schedules themselves or in the Tariff Classification Study notes (footnote omitted) which indicates that the language "with stainless steel handles" is to be given any construction other than a literal one. In fact, the juxtaposition of the language "with stainless steel handles" in part 3E of schedule 6 of the tariff schedules with coordinate provisions for knives with handles composed of other, specifically designated materials, indicates to the contrary. Thus, under the inferior heading "knives with their handles" there are five subdivisions of knives with handles, grouped according to the specific material of which the handle is composed, followed by a sixth or residual grouping designated only as "other." Such arrangement indicates, in our opinion, that Congress intended to classify "knives with their handles" according to the single, specific material of which

> the handles were composed, or if not so made, then under a residual category. (59 CCPA, pp. 210–211.)

The Court of Customs and Patent Appeals added:

> * * * Considering the phrase "a stainless steel handle" in the context of common, everyday speech, we think that a person hearing the phrase would take it to mean that the handle is composed solely of the named material except, perhaps, for insignificant or negligible quantities of other materials, and would not expect to find substantial portions of other materials. The interpretations proposed by the Government, "in chief value of" and "predominantly," admit of significant amounts of other materials and do not comport with what we agree with the Customs Court to be a "literal construction" of the phrase. * * * (59 CCPA, p. 211.)

Applying the same analysis, the knives here may not be classified as knives with stag or wood handles because of the presence of the metal pommel and guard.

A second case which supports the defendant's classification is *National Carloading Corp.* v. *United States*, 46 Cust. Ct. 1, C.D. 2224 (1961), *aff'd on rehearing*, 54 Cust. Ct. 178, C.D. 2529 (1965). According to the court, "the sole question presented for our determination is whether the length of the knives, exclusive of the handles, is under 4 inches." 46 Cust. Ct., page 2. This, in turn, raised the question of whether the knives' bolsters or guards were part of their handles.

In *National Carloading*, reliance was placed on an expert who testified: "The design of this handle ends in what we call in our trade, a bolster." He also stated that where "the blade portion ends, that is where the handle starts." Id., page 3. In addition, the court relied upon three different dictionary definitions. Judge Lawrence concluded for the court: "These definitions clearly indicate that a blade is the cutting portion of a knife, the other portion being described as the handle." Id., page 4.

Finally, plaintiff claims in the alternative that prior Customs practice existed which classified knives, such as those imported here, as wood-handled or stag-handled knives. This assertion in plaintiff's brief is offered without any support. No evidence was introduced at the trial as to earlier Customs practice. *Ditbro Pearl Co., Inc.* v. *United States*, 72 Cust. Ct. 1, 8, C.D. 4497, 393 F. Supp. 1398 (1974), *aff'd*, 62 CCPA 95, C.A.D. 1152, 515 F. 2d 1157 (1975). All that exists in the record is some unsupported comments by plaintiff's counsel. Such opinions are not evidence. *Tropi-Cal* v. *United States*, 63 Cust. Ct. 518, C.D. 3945 (1969). In any case, there has been no showing of an established uniform practice within the meaning of 19 U.S.C. 1315(d).

Plaintiffs in this court bear a burden of proof to demonstrate the incorrectness of the Customs Service's classification and to establish the propriety of their asserted classification, whether primary or

alternative. *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970). Plaintiff has failed to meet that burden here.

Action dismissed. Judgment will be entered accordingly.

(C.D. 4833)

LOFFREDO BROS., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

On Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment

Court No. 76-8-01789

[Plaintiff's motion denied; defendant's cross-motion granted.]

(Dated December 18, 1979)

Barnes, Richardson & Colburn (*Jacqueline Nolan-Haley* on the briefs) for the plaintiff.

Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Susan C. Cassell* on the brief), for the defendant.

MALETZ, Judge: This case which comes before the court on cross-motions for summary judgment involves the proper tariff classification of Communion pins imported from Italy in 1974 via the Port of New York. The pins were classified by the Government under item 740.38 of the Tariff Schedules of the United States, as modified by T.D. 68-9, as other jewelry and other objects of personal adornment valued over 20 cents per dozen pieces or parts and assessed duty at the rate of 27.5 percent ad valorem. Plaintiff claims that the pins are properly dutiable at the rate of 10 percent ad valorem under item 740.60, as modified by T.D. 68-9, as other religious articles of a purely devotional character designed to be worn on apparel or carried on or about or attached to the person.

The Statutes

The statutes involved are contained in schedule 7, part 6, subpart A of the tariff schedules. They are as follows:

Subpart A headnotes:

* * * * * * *

2. For the purposes of this subpart—
   (a) the term "jewelry and other objects of personal adornment" * * * does not include—

* * * * * * *

(ii) religious articles of a purely devotional character * * *

Classified under:

Jewelry and other objects of personal adornment not provided for in the foregoing provisions of this part (except articles excluded by headnote 3 of this part), and parts thereof:

* * * * * * *

Valued over 20 cents per dozen pieces or parts:

* * * * * * *

740.38	Other	27.5% ad val.

Claimed under:

Religious articles of a purely devotional character designed to be worn on apparel or carried on or about or attached to the person:

* * * * * * *

Crucifixes and medals:

* * * * * * *

740.60	Other	10% ad val.

At the outset, the parties agree that no material issue of fact exists which need be resolved by trial. Instead, the parties agree that the case may be determined on the basis of the record before the court.

Against this background, plaintiff in support of its motion for summary judgment has submitted the affidavit of Frank Loffredo, the president of the plaintiff-importer, Loffredo Bros., Inc.; the affidavit of Msgr. Harry J. Byrne, pastor of St. Joseph's Church in New York City, N.Y.; copies of several pages from catalogs of companies selling religious articles; and representative samples of the imported merchandise.

Defendant in support of its cross-motion for summary judgment has submitted the affidavit of Father James O'Connor, a Roman Catholic priest who is professor of dogmatic theology at St. Joseph's Seminary in Yonkers, N.Y., and the deposition of Msgr. Harry J. Byrne, whose affidavit, as previously indicated, was submitted by plaintiff.

Considering first the imported merchandise, it consists of two golden-colored Communion pins: Style No. 671 (pin No. 1) which is one-half inch long; and style No. 672 (pin No. 2) which is 1 inch long. These pins are described by Msgr. Byrne in his deposition as follows (pp. 9–11):

> The pin marked No. 1 represents a chalice, which is an article that is used in the Mass, the chief service in the Catholic Church, and from the top of the chalice is a round semicircle, which is

obviously representing the Host, which is received in the Mass and in Holy Communion.

The part that represents the Host has the letters IHS on it. These are representations of three Greek letters that indicate the name of Jesus.

There's also another symbolism in these initials from the Latin and they refer to the phrase "in hoc signum," meaning "in this sign."

It appears frequently on a cross or on vestments that are used at the Mass and it refers to the cross as a sign of Christian belief, and in this case, the Host, the Communion Host, is a sign of Christian belief.

* * * * * * *

The pin marked No. 2 is very similar to the first pin that I described. The pin marked No. 2 is also representative of a chalice, the article used in the Mass, and above the chalice appears a circle, which obviously represents the Host received in the Mass and received at Communion.

At the base of the chalice is the word "sanctus," which is the Latin for "holy." Above that word is a cross.

On the upper part of the chalice, there is a representation of an angel. On the part representing the Host, there is also a cross.

With regard to these imported Communion pins, it is undisputed:

1. That plaintiff sells the imported pins only to religious article stores.

2. That the pins are advertised only in religious article catalogs and only in connection with the celebration of First Holy Communion.

3. That the pins symbolize the Holy Eucharist, one of the seven sacraments of the Roman Catholic Church.

4. That the pins are given to children on the occasion of their First Holy Communion.

5. That the First Holy Communion is given to a child who has reached a level of religious maturity so that he can henceforth receive the Sacrament of the Holy Eucharist.

In this setting, the single issue is whether the imported Communion pins are "purely devotional" within the meaning of item 740.60.

On this issue we have the affidavit (presented by plaintiff) and the deposition (taken by the defendant) of Monsignor Byrne who was ordained as a Roman Catholic priest 33 years ago and is presently pastor of St. Joseph's Church in New York. He has been a monsignor—a title of honor signifying membership in the papal household—for the past 17 years. Monsignor Byrne attended Cathedral College, St. Joseph's Seminary in Yonkers and Catholic University of America, from which school he holds a doctorate in canon law. He has also held administrative positions in the New York Archdiocese.

In his affidavit, Monsignor Byrne stated that the pins have special religious significance, representing the Holy Eucharist; that their purpose is to excite pious devotion; and that they are worn as acts of devotion. Further, Monsignor Byrne testified in the course of his

deposition that he considered the Communion pins to be purely devotional because they would not be worn on an occasion that was not associated in some way to the reception of the First Holy Communion. He added that a child would be inclined to wear a Communion pin to church on Sunday or when going to school for a period of a few months after receiving First Holy Communion.

With respect to the use of the Communion pins, Monsignor Byrne testified as follows (dep. pp. 13–14):

> *Q.* After the Communion ceremony, are you familiar with what happens to the pins after this particular ceremony? How they are used, if they are used?
>
> A. Yes. These pins would be worn by the children for a period of time, maybe some months after the ceremony, and then they would generally be kept with the family heirlooms. A certificate indicating that the child had received First Holy Communion on such and such a date, perhaps the armband, the ribbon that they wear on the occasion, and generally that kind of a pin would be kept by a family in a box with sort of their memorabilia from childhood.
>
> I might also add that sometimes decorative certificates are given which the families frequently frame and place in the child's room or somewhere in the house and frequently the pin will be attached to that decorative certificate.
>
> *Q.* Would you agree that these pins are commemorative in nature, to commemorate the date or the time that the child made their First Holy Communion?
>
> A. Yes, I would agree that the pins are commemorative in nature.
>
> I would add that they are more than that, in that they are a religious article that tends to inspire devotion or prayer on the part of the child who receives it.
>
> *Q.* Might they also be more than a religious article in that they tend to, as well as inspiring devotion, commemorate the happening of a particularly significant event?
>
> A. Yes.

Further, Monsignor Byrne testified that in his opinion the imported Communion pins were "purely devotional" (dep. p. 20) within the following definition of that term (dep. p. 36):

> I think something would be purely devotional that would have a primary quality of religious significance.
>
> It would be something that would move a believer to prayer, to meditative reflection on the mysteries of life, of creation, of where we're going, the religious dimensions of our lives.
>
> It would be something that would be used primarily on religious occasions.

Defendant, in addition, submitted the affidavit of Father James O'Connor, a Roman Catholic priest for the past 13 years. Father O'Connor was a parish priest at a church in the Bronx, N.Y., from 1966 to 1969. In 1969, he went to Rome where he received a degree as doctor of theology from the University of St. Thomas in 1972. For

the past 8 years, Father O'Connor has been professor of dogmatic theology at St. Joseph's Seminary in Yonkers, N.Y.

In his affidavit, Father O'Connor, after indicating that he had examined the Communion pins in question, then stated:

> 6. I am very familiar with pins of this nature and know that they are given to children on the occasion of their First Holy Communion, to be worn on the clothing.
> 7. It is my opinion that although Communion pins possess a certain religious significance, they are not of a purely devotional nature, that is, they are not used solely to connote pious thoughts and aspirations and to excite one's thoughts to heavenly things.
> 8. These Communion pins are unlike rosary beads and religious medals which are purely and directly devotional.
> 9. The primary purpose of the First Communion pins is to commemorate the occasion of the child's First Holy Communion and to symbolize that the child has reached a certain level of religious maturity and can henceforth receive the Sacrament of the Eucharist.

The record is thus clear that the Communion pins have both a religious and commemorative significance. Beyond that, Monsignor Byrne was of the opinion that their religious significance is primary (dep. p. 22), while Father O'Connor was of the opinion that their primary purpose is commemorative (aff. p. 2, par. 9). In light of these considerations, we must determine whether the imported Communion pins are of a "purely devotional nature" within the meaning of item 740.60.

The question of what constitutes an article of purely devotional character was considered in *Panation Trade Co.* v. *United States*, 62 Cust. Ct. 464, C.D. 3802, 298 F. Supp. 752 (1969). There, a medal symbolically depicting the Holy Trinity on one side and the risen Christ on the other side, was held to be a religious article of a purely devotional character under the provisions of item 740.60. In reaching that conclusion, the court noted that the term devotional "is a 'religious * * * word used to connote pious thoughts and aspirations' and to excite one's thoughts to heavenly things." As relevant in this regard, the court cited the following dictionary definitions of the words "purely" and "devotional" (62 Cust. Ct. at 469):

> *Funk & Wagnalls New "Standard" Dictionary of the English Language* (1956)—
>
> *purely* adv. 1. In a pure manner. * * * (2) Completely; totally; absolutely * * * .
>
> *devotional* a. Of or pertaining to devotion; of the nature of or expressing devotion; devout.
>
> *devotional* n. 1. The state of being devoted. (1) Zealous application to any pursuit or practise, especially to religious duties; devoutness. (2) Strong attachment expressing itself in earnest service; ardor; zeal. * * * 2. An expression or act of devotedness or devoutness; especially an act of religious worship * * * .

Webster's Third New International Dictionary of the English Language (1963)—

purely adv: without admixture—usually used in combination with an adjective * * *.

devotional adj: relating to, suited to, used in, or characterized by devotion (as religious devotion) * * *.

The court in *Panation* further noted that whether an article is one of religious devotion is determined largely by its nature and the subject with which it deals. 62 Cust. Ct. at 470. Tested by this standard, it must be concluded that although the subject matter of the Communion pins here involved has religious significance, the undisputed facts demonstrate that their nature and use are not purely devotional within the meaning of item 740.60.

On the contrary, it appears clear that the Communion pins at bar are commemorative in nature much in the manner of a graduation pin or ring. Thus, according to Monsignor Byrne's deposition, the pins are worn for a short period of time either to church or to school and then are usually put away in a box with other memorabilia from childhood such as the ribbon, armband, or stole worn on the occasion. Significant in this respect is the fact that sometimes the pins are attached to the decorative certificates issued to commemorate the First Holy Communion which are framed and displayed in the house. The short of the matter is that the pins are not of a purely devotional character but rather are "really a memento of the religious event." See Monsignor Byrne deposition page 30.

In view of all the foregoing, the court holds that the plaintiff has failed to sustain its burden of establishing that the imported Communion pins are of a "purely devotional character" within the meaning of item 740.60. Accordingly, plaintiff's motion for summary judgment is denied; defendant's cross-motion for summary judgment is granted; and the action is hereby dismissed.

(C.D. 4834)

LABAY INTERNATIONAL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 76-11-02561

[Judgment for defendant.]

(Decided December 21, 1979)

Givens & Deem (*Robert T. Givens* on the briefs) for the plaintiff.

Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Susan Handler-Menahem* on the brief), for the defendant.

MALETZ, Judge: The only issue in this case—which has been submitted on a stipulation of facts—is whether the court has jurisdiction. Two questions are presented in this connection: (1) Whether a valid protest was filed within the 90-day period required by 19 U.S.C. 1514(b)(2); and (2) in the event a valid protest was filed within this time period, whether the action was commenced in this court within 180 days after notice of denial of such protest, as required by 28 U.S.C. 2631(a).

The case arises as follows: In April 1972, the merchandise here involved—consisting of drill pipe and equipment—was exported from Houston, Tex., to the Ivory Coast, West Africa. Thereafter, in November 1973, the merchandise was entered back into Houston without advancement in value or improvement in condition by any process of manufacture or other means while abroad. Accordingly, plaintiff claimed duty-free treatment for the merchandise under item 800.00 of the tariff schedules as American goods returned. The claim, however, was rejected by Customs because the necessary documentation was lacking. In that circumstance, the merchandise was liquidated on October 18, 1974, under item 610.52 as iron pipe and assessed duty at the rate of 13 percent ad valorem.

On December 4, 1974, plaintiff sent a letter to the district director of Customs at Houston requesting reliquidation of the merchandise pursuant to section 520(c)(1) of the Tariff Act of 1930, as amended (19 U.S.C. 1520(c)(1)).[1] This letter read as follows:

> C.E. 03673 of November 28, 1973; Liquidated October 18, 1974; Intairdril Co.; Customs bill number 80100990.
>
> DISTRICT DIRECTOR OF CUSTOMS,
> *701 San Jacinto Street,*
> *Houston, Tex.*
>
> SIR: In connection with the above reference, please find attached the following documents:
>
> Copy of the export ocean bill of lading at Houston, Tex., executed on April 16, 1972, B/L 8 with attachments as to the items exported.
>
> Copy of the export insurance certificate No. 6894 covering the export shipment.
>
> Atwood Oceanics, Inc., export invoices Nos. 21200, 21201, 21208, 21207, covering the original exportation of this importation.
>
> Copies of the shipper's export declarations Nos. 76830, 76975, 76839, 77037.
>
> International Tool invoice.
>
> Telex of August 17, 1973.
>
> Customs form 3311 completely executed.
>
> This particular entry was placed away through error in our filing system, and only came to light upon liquidation of the entry.

[1] Sec. 520(c)(1) authorizes Customs to reliquidate an entry to correct a clerical error, mistake, or fact, or other inadvertence—notwithstanding a valid protest was not filed.

> Under the circumstances withe [sic] documents attached and a completed Customs form 3311, we respectfully ask that the entry be reliquidated withe [sic] the cancelation [sic] of the duties assessed as provided for under section 520(c)(1), Tariff Act of 1930, as amended, as an inadvertence, and section 173.3 [sic], Customs Regulations.
>
> Respectfully,
>
> LABAY INTERNATIONAL, INC.,
> ALLEN LABAY.

This request for reliquidation was denied by Customs on December 4, 1974, the day of its receipt.

On January 17, 1975, 91 days after liquidation, plaintiff filed a protest on Customs form 19 which was denied on January 27, 1975, as untimely.

On February 4, 1975, plaintiff again wrote to the district director at Houston again requesting review of the entry relying upon section 520(c)(1) and section 173.4 of the Customs Regulations because of plaintiff's inadvertence.

On March 25, 1975, the district director at Houston informed plaintiff that its request for reliquidation in its letter of December 4, 1974, was denied.

On May 9, 1975, plaintiff again filed a protest on Customs form 19 against the refusal to reliquidate under section 520(c)(1). This protest was denied on June 16, 1975.[2]

On September 23, 1976, plaintiff requested accelerated disposition of the letter filed on December 4, 1974. On October 22, 1976, the district director denied this request for accelerated disposition on the basis that he did not consider the letter of December 4, 1974, to be a protest.

On November 18, 1976, plaintiff filed summons No. 76-11-02561 in this court claiming that its alleged protest of December 4, 1974, was denied on October 23, 1976 [sic].

With these facts in mind, we consider now the first question—whether a legally sufficient protest was filed within the 90-day period required by 19 U.S.C. 1514(b)(2). As to this, plaintiff's position is that its letter of December 4, 1974, which was filed after the liquidation of the merchandise on October 18, 1974—was a valid protest. The court agrees.

At the outset, it is to be observed that "a protest is not required to be made with technical precision, but the objections must be distinct, specific, and sufficient to show that the objection made * * * was in the mind of the importer and was brought to the attention of the

---

[2] On Dec. 12, 1975, plaintiff filed a summons against the denial on June 16, 1975, of the protest of May 9, 1975. This summons was denominated Court No. 75-12-03184. However, on Sept. 9, 1977, plaintiff abandoned that action.

collector, so he might have an opportunity to correct his mistake, if any." Sturm, "A Manual of Customs Law" (1974), page 9. However cryptic, inartistic, or poorly drawn a communication may be, it is sufficient as a protest if it conveys enough information to apprise officials of the importer's intent and the relief sought. *Mattel, Inc.* v. *United States*, 72 Cust. Ct. 257, C.D. 4547, 377 F. Supp. 955 (1974). In *Mattel*, it was held that a letter requesting correction under section 520(c) of the Tariff Act of 1930, as amended, and citing a case involving similar merchandise, was sufficient to meet the protest requirements of section 514 of the Tariff Act of 1930 (19 U.S.C. 1514) since it set forth the importer's claim clearly. The reference to section 520(c) was treated as a gratuitous addition. Since the claim was made within the statutory period for filing protests, the court held that it had jurisdiction.

Against this background, it must be concluded that the December 4, 1974 letter was sufficient as a protest since it conveyed enough information to apprise the district director of the importer's intent and the relief sought. Thus, the letter itself and its attachments clearly indicated the entry number, the date of liquidation, the specific merchandise concerned, the dates of export of such merchandise from the Port of Houston, a request that the liquidated duties be canceled, and that plaintiff was claiming the merchandise in question consisted of American goods returned and should be classified as such under item 800.00, free of duty. The fact that the district director treated the December 4, 1974 letter as a section 520(c) request rather than as a section 514 protest is scarcely controlling for "[t]he test for determining the sufficiency of a protest under section 514 * * * is an objective one and is not dependent upon the district director's subjective reaction thereto." *Mattel, Inc.* v. *United States*, *supra*, 72 Cust. Ct. at 266.

In sum, it is held that the December 4, 1974 letter was a sufficient and timely protest.[3]

But even though this December 4, 1974 letter was a valid protest, the court lacks jurisdiction since the summons was filed on November 18, 1976, more than 180 days after the denial of the protest.

Plaintiff, however, contends that defendant did not provide it with a "notice of denial" as required by 28 U.S.C. 2631. The contention is without merit. The record establishes that plaintiff's request of December 4, 1974, was denied on December 4, 1974, by Customs entry aid, Denzil R. Harrelson, after consulting with his supervisor, Customs import compliance officer, Steve H. Lee, and was written directly on plaintiff's request. Further, the denial was received by

[3] At a previous stage in this litigation, defendant moved to dismiss the action for lack of jurisdiction on the sole ground that the Dec. 4, 1974 letter did not constitute a valid protest. That motion was denied.

plaintiff on December 4, 1974, as evidenced by the date stamp of plaintiff, Labay International, on the upper, right-hand side of the letter.

The specific denial is contained in a notation on the bottom of plaintiff's letter of December 4, 1974, and reads as follows:

> Allen [Labay]
> Steve and I have looked over these documents and there is not anything that we can do about reliquidating.
>
> DENNY H.

The only requirements concerning the form of a denial of a protest are found in 19 CFR 174.29 and 174.30 (1974). 19 CFR 174.29 states in pertinent part:

> The district director shall allow or deny in whole or in part a protest filed in accordance with section 514, Tariff Act of 1930, as amended (19 U.S.C. 1514) within 2 years from the date the protest was filed. * * * If the protest is denied in whole or in part the district director shall give notice of the denial in the form and manner prescribed in section 174.30.

19 CFR 174.30 states in pertinent part:

> (a) *Issuance of notice.*—Notice of denial of a protest shall be mailed to any person filing a protest or his agent in all cases * * * For purposes of section 515(a), Tariff Act of 1930, as amended (19 U.S.C. 1515(a)), the date appearing on such notice shall be deemed the date on which such notice was mailed.

Plaintiff does not dispute that during the period in question, Customs entry aid Harrelson and Custom import compliance officer Lee had authority to act for the district director on this matter. Therefore, since the court has held that the December 4, 1974 letter is a valid protest, it necessarily follows that the protest was denied on the same date by the notation on that letter.

There is no precise form that a denial of a protest must take. Thus in *Ogden Marine, Inc.* v. *United States*, 60 CCPA 110, C.A.D. 1090, 473 F. 2d 1405 (1973) a carbon copy of a protest was returned to the plaintiff with notations of denial thereon. The court held that this constituted a valid "notice of denial" because "(n)otice of 'denial' is all that the statute requires. Nor * * * (is) it mandatory that the form be labeled in any particular manner so long as the necessary information is unequivocally conveyed to the proper party." 60 CCPA at 112. Similarly in the present case, Customs unequivocally conveyed to plaintiff notice that the request in its December 4, 1974 letter for duty-free entry as American goods returned was denied.

What is more, even assuming contrary to the actual situation that the notation on the December 4, 1974 letter was not sufficient, cer-

tainly Customs letter of March 25, 1975, was a plain and explicit denial. For on March 25, 1975, the district director wrote plaintiff stating in part:

> 6. Your letter, received December 4, 1974, requested that the entry be reliquidated with the cancellation of the duties assessed under section 520(c)(1), Tariff Act of 1930, as an inadvertence. You attached what you described as a completed CF 3311. This document was not acceptable. *Your request was denied.* [Italic added.]
>
> * * * * * * *
>
> * * * [Y]ou were notified on four separate occasions of the necessity of providing evidentiary documents in order for liquidation or reliquidation to be made under TSUS 800.00. It is the opinion of this office that the failure to file required documents whose absence was repeatedly called to your attention constitutes negligent inaction on your part.
>
> Your unsatisfactory untimely efforts to effect correction did not contribute to a solution to this problem. It is the position of this office that relief under section 520(c)(1), Tariff Act of 1930, *cannot be granted.* [Italic added.]

The court is mindful that the summons filed in this action claims that plaintiff's protest was denied on October 23, 1976. This is presumably based on plaintiff's request of September 23, 1976, for accelerated disposition of its letter of December 4, 1974. However, this request for accelerated disposition was nothing more than a meaningless act since plaintiff's letter of December 4, 1974, had already been denied previously.

Finally, plaintiff contends that the denials of December 4, 1974, and March 25, 1975, were no more than denials of its December 4, 1974 request for reliquidation under section 520(c). But plaintiff cannot have it both ways. Plaintiff cannot contend on the one hand that the claim in its letter of December 4, 1974, was a valid protest and on the other hand argue that denial of this claim was not denial of a protest. If the letter of December 4, 1974, is to be considered a valid protest by the court (and, as previously discussed, the court so considers it), then Customs denial of the claim contained in that letter was necessarily a denial of the protest.

It is therefore held that since the summons in this action was filed November 18, 1976, more than 180 days after the denials of December 4, 1974, and March 25, 1975, the action is time-barred by 28 U.S.C. 2631 and is hereby dismissed.

DECISIONS OF THE UNITED STATES CUSTOMS COURT

Rules

(C.R.D. 79–12)

FRUEHAUF CORPORATION, PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Court No. 78–7–01295

Opinion and Order on Defendant's Motion to Compel Discovery

[Defendant's motion denied.]

(Dated July 12, 1979)

Webster & Chamberlain, Esqs. (*Christopher L. Hartwell*, Esq., of counsel) for the plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation, *Jerry P. Wiskin*, trial attorney, Esqs., for the defendant.

NEWMAN, Judge: Defendant has moved in accordance with rule 6.5(a) for an order compelling plaintiff to further respond to certain written interrogatories directed to plaintiff on March 6, 1979, concerning which plaintiff has interposed objections. Under all the facts and circumstances, and for the reasons indicated below, defendant's motion is denied.

The relevant background affecting this application is as follows:

On August 10, 1978, defendant moved to dismiss the instant action on the ground that it purports to cover two protests that were previously summoned by plaintiff in court No. 77–11–04640, in contravention of 28 U.S.C. 1582(d).[1] Concurrently, defendant moved for severance and dismissal in court No. 77–11–04640 on the ground that the action was filed untimely respecting one of the protests covered by the summons. In court No. 77–11–04640, plaintiff cross-moved for dismissal of that entire action on the ground that it was filed prematurely (viz, prior to denial of the protests). By an order entered on

[1] 28 U.S.C. 1582(d), so far as pertinent, reads: "Only one civil action may be brought in the Customs Court to contest the denial of a single protest."

November 20, 1978, defendant's motion for severance and dismissal of court No. 77–11–04640 was denied and plaintiff's cross-motion to dismiss that entire action was granted. Additionally, defendant's motion to dismiss the present action was denied by another order entered on November 20, 1978.

In opposition to defendant's present motion, plaintiff contends that by interrogatories numbered 2 through 9, to which plaintiff has objected, defendant is attempting to inquire into matters relating to the court's jurisdiction that were previously adjudicated by my orders on November 20, 1978. Interrogatories numbered 2 through 9 seek to ascertain facts concerning the maintenance of records by plaintiff relative to the requests for accelerated disposition received by the Customs Service respecting protest Nos. 28096–001206 and 28097–000075. Plaintiff relies upon the doctrines of collateral estoppel and the law of the case to preclude the inquiry sought by defendant.

In support of its motion, defendant argues that my jurisdictional ruling of November 20, 1978, in the present case was not a final order and was "without prejudice"; that the court should, in its discretion, decline to apply the "law of the case" doctrine where jurisdictional questions are presented; and that jurisdictional questions may be raised at any stage of the proceedings.

The nub of the issue is whether defendant's interrogatories 2 through 9, which admittedly inquire into factual matters germane only to the jurisdictional questions previously adjudicated in court No. 77–11–04640 and in the present action, are now relevant.

While this court may, at any stage of the proceedings, entertain jurisdictional challenges predicated upon new grounds not previously adjudicated,[2] "the practice of the courts generally to refuse to reopen what has been decided" (*Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912) is applicable here. *Cf. Delaware Watch Co., Inc.* v. *United States*, 64 Cust. Ct. 659, R.D. 11698, 311 F. Supp. 1320 (1970). Moreover, it must be recognized that under the salutary principles of res judicata and collateral estoppel, defendant is precluded from relitigating the same jurisdictional issue heretofore determined by the prior final judgment in court No. 77–11–04640, dismissing the action as premature. See 1B "Moore's Federal Practice" (2d ed. 1974) §§ 0.401, 0.405, 0.409[6], 0.445.[3] For an excellent analysis of the doctrines of res judicata and collateral estoppel see an opinion by Chief Judge Re in *Nichols & Company, Inc.* v. *United States*, 80 Cust. Ct. 26, C.D. 4734, 447 F. Supp. 455 (1978), *aff'd*, 66 CCPA 160, C.A.D. 1217, 586 F. 2d 826 (1978). And see Judge Maletz' comprehensive discussion of

[2] Defendant concededly does not seek to urge a new ground for lack of jurisdiction. The disputed interrogatories concern requests for accelerated disposition mailed to the Customs Service, which were previously involved in the motion for severance and dismissal in court No. 77–11–04640.

[3] While collateral estoppel has been held to be inapplicable to classification (*United States* v. *Stone & Downer Co.*, 274 U.S. 225 (1927)), in court No. 77–11–04640, the only issue adjudicated by the dismissal was jurisdiction.

collateral estoppel in reappraisement cases in *J. E. Bernard & Co., Inc.* v. *United States*, 66 Cust. Ct. 545, R.D. 11739, 324 F. Supp. 496 (1971).

Finally, in support of its position, defendant points out that the words "with prejudice" were stricken out of plaintiff's proposed order denying defendant's motion to dismiss in this action, and thus erroneously infers that the denial of its motion was "without prejudice." Such inference is totally unwarranted. Plainly, a court's order directing denial of a motion to dismiss need not expressly state "with prejudice" to have that effect. If an order were intended to be "without prejudice," the court explicitly so indicates, and thereby does not leave such matter to inference.

Under the present posture of this case, it is clear that interrogatories 2 through 9 have no present or prospective relevance, and hence no purpose would be served by requiring plaintiff to further respond. Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED that defendant's motion to compel discovery is denied.

(C.R.D. 79-13)

CONCORD ELECTRONICS CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

On Plaintiff's Motion for Partial Summary Judgment and Defendant's Cross-Motion for Summary Judgment

Court No. 74-6-01614

[Motions denied.]

(Dated September 27, 1979)

Serko & Simon (*Margaret H. Sachter* on the briefs) for the plaintiff.

Alice Daniel, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Jerry P. Wiskin* on the briefs), for the defendant.

RICHARDSON, Judge: In this action invclving the dutiable value of tape recorders and parts and other electronic equipment exported from Japan, plaintiff has moved for partial summary judgment pursuant to rule 8.2 of the Customs Court rules, and defendant has cross-moved for summary judgment under the rule.

In support of the motion, plaintiff contends that defendant has admitted that as to each of the involved entries the commission indicated on the entry documents was included as one of the elements of value in determining the appraised value of that entry. On this basis, plaintiff seeks a ruling from the court that the commissions are *separable*, and that plaintiff may challenge the dutiability of the com-

missions (plaintiff abandons its claim as to nondutiability of inland charges) while relying upon the presumption of correctness as to the other elements of the appraisement (separability doctrine).

In support of the cross-motion, defendant contends (for the second time in this action) that the issue raised in *Concord Electronics Corp.* v. *United States*, 69 Cust. Ct. 241, A.R.D. 304, 345 F. Supp. 1000 (1972), *appeal dismissed*, 60 CCPA 185 (1972), is identical to that in this action, namely, whether the proper export value is equal to the total ex-godown invoice value (total invoice value less amounts represented on the invoices as being for buying commission and inland charges), as claimed by plaintiff, or whether it is represented by the appraised value, which is equivalent to the entered value. On this basis, defendant seeks a judgment of dismissal under the doctrine of collateral estoppel upon the authority of *Nichols & Company, Inc.* v. *United States*, 66 CCPA 28, C.A.D. 1217, 586 F. 2d 826 (1978).

On the papers before the court, the court is of the opinion that both motions should be denied, and so rules.

Plaintiff has mistaken its remedy. The *sine qua non* for relief under rule 8.2 is the resolution of all or some part of the litigated claim. Plaintiff does not seek the resolution of any part of its claim, only a reduction of its burden of proof under the judicial doctrine of *separability*. Such is not the mission of summary judgment under rule 8.2.

Although *Nichols* extends the doctrine of collateral estoppel to reappraisement cases where decision in the prior action turned upon a failure of proof, the holding only applies in cases where "the controlling facts and applicable legal rules remain unchanged." The moving and cross-moving papers disclose the existence of a 2-year hiatus between the importations in the prior case and those at bar with a resulting difference in the dollar value of the merchandise in both cases that generates a dispute relative to the nature and extent of a commission, if any. Under these circumstances, the court cannot say that the *controlling facts* in Concord I are the same as those in Concord II. Consequently, and hopefully, for the last time, the court concludes that issue exists in the case which should be resolved at a trial.

(C.R.D. 79–14)

BRANIFF AIRWAYS, INC., PLAINTIFF v. UNITED STATES, DEFENDANT

Memorandum Opinion Accompanying Order

Court No. 75–3–00646

[Order denying judgment on pleadings and stipulation of facts.]

(Dated November 14, 1979)

Arnold & Porter (*Paul S. Berger* and *Kenneth A. Letzler* on the brief), for the plaintiff.

Alice Daniel, Acting Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*James A. Resti* on the brief), for the defendant.

BOE, Judge: Pursuant to a stipulation entered into between the respective parties, the above-entitled action is submitted to the court for judgment on the pleadings and on an accompanying statement of facts contained therein.

From the foregoing, the following facts have been established. The merchandise in question consists of 13 BAC 1-11 jet passenger aircraft manufactured by the British Aircraft Corp. (hereafter referred to as BAC) in the United Kingdom, imported therefrom by the plaintiff into the United States and entered at the Port of Newark, N.J., between March 1965 and January 1966. Included in the dutiable value of each aircraft, set forth with particularity in plaintiff's complaint, is the sum of $57,115 attributable to the cost of warranties specifically so allocated in the purchase price contained in the contract entered into between the plaintiff and British Aircraft Corp. (Exhibit A). The warranty provisions contained in the purchase contract specified that defects which, if discovered in the subject merchandise within a defined period of time, would be corrected in the manner as therein provided.[1] The geographical situs where repairs might be made included the United States. The warranty provisions contained in the purchase and sale contract relating to the imported merchandise was a commercial warranty, as distinguished from a consumer warranty, and was negotiated at arm's length between the parties possessing relatively equal bargaining power and economic strength. The provisions relating to the merchandise in question differed in various respects from warranty provisions contained in purchase and sale contracts relating to similar aircraft between BAC and other purchasers in the United States.

The parties are in agreement that the appraisement of the subject merchandise properly was made on the basis of constructed value pursuant to section 402(d), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956 (19 U.S.C. 1401a) providing:

> (d) Constructed value
>
> For the purposes of this section, the constructed value of imported merchandise shall be the sum of—
>
> (1) the cost of materials (exclusive of any internal tax applicable in the country of exportation directly to such materials or their disposition, but remitted or refunded upon the exportation of the article in the production of which such materials are used) and of fabrication or other processing of any kind employed in producing such or similar merchandise, at a time preceding the date of exportation of the merchandise undergoing appraisement which would ordinarily

[1] Exhibit A, Art. 6, secs. 6.01, 6.02, and 6.03.

permit the production of that particular merchandise in the ordinary course of business;

(2) an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise undergoing appraisement which are made by producers in the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for shipment to the United States; and

(3) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the merchandise undergoing appraisement in condition, packed ready for shipment to the United States.

The sole question, therefore, presented for determination herein is whether the sum attributable to the cost of the warranties provided for in the purchase and sale agreement negotiated by the plaintiff and BAC should have been included in the appraised constructed value of the merchandise in question.

In the determination of the constructed value, it appears that the parties are in agreement that the cost of the warranties in question are not properly included under either subsection (1) of the aforequoted statute providing for the "cost of materials" or of the "fabrication or other processing of any kind employed in producing such or similar merchandise" or under subsection (3) thereof providing for the cost of "containers and coverings" or "other expenses incidental to placing the merchandise in question packed ready for shipment to the United States." A disagreement does exist, however, as to whether the cost of such warranties should be included under subsection (2) of the statute providing for "general expenses and profit" reflected in the sale of the merchandise in question.

It is the opinion of the court, therefore, that neither the pleadings nor the accompanying stipulation of facts submitted are sufficient in themselves to permit the adjudication of the issue which the parties seek in this proceeding.

In the determination of the general expenses to be included in the computation of the constructed value of the imported merchandise, the statute provides the manner in which the same shall be ascertained. The provisions thereof delineate precisely the character of the factual evidence required and deemed material in such a determination. Subsection (2) of the statute provides in pertinent part that, the "general expenses and profit" included in the constructed value of merchandise must be equal to that usually reflected in sales of goods of the same general class or kind undergoing appraisement which *are made by producers in the country of exportation*. The stipulation entered into and submitted by the parties in this action does not indicate whether the cost of warranties of the nature in issue herein is usually reflected in the sales of merchandise for export of the same general class or kind by *other producers* in the country of exportation, but

rather is solely limited to the practices of one producer, BAC, in its export sale agreements with the plaintiff and other U.S. purchasers. Nor has a showing been made that such other producers of merchandise of the same class or kind do not exist or that after diligent inquiry any information relating to the "general expenses and profit" of other producers has proved to be unobtainable. *N. M. Albert Co., Inc., et al.* v. *United States*, 62 Cust. Ct. 1029, A.R.D. 254 (1969); *John V. Carr & Son, Inc.* v. *United States*, 52 CCPA 62, C.A.D. 860 (1965); and *Hong Kong Fashions, Ltd.* v. *United States*, 67 Cust. Ct. 488, R.D. 11751 (1971). Thus, an evaluation of the "general expenses and profit" in connection with the production of the merchandise at issue cannot be made pursuant to the statutory mandate.

In view, therefore, of the existence of a genuine issue of material facts remaining in connection with the determination of the appraised constructed value of the subject imported merchandise, judgment on the pleadings and on the accompanying stipulation of facts filed herein cannot be granted.

Now therefore, it is hereby

ORDERED, ADJUDGED and DECREED that judgment on the pleadings and on the stipulated facts submitted by the parties hereto be and is hereby denied.

(C.R.D. 79-15)

OVERSEAS MAILMAN, INC. *v.* UNITED STATES

On Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment

Court No. 78-2-00357

[Motions denied.]

(Dated November 20, 1979)

Siegel, Mandell & Davidson (*Stephen M. Zelman* on the brief) for the plaintiff.
Alice Daniel, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Susan Handler-Menahem* on the brief), for the defendant.

FORD, Judge: In this action plaintiff has filed a motion for summary judgment, pursuant to rule 8.2 of the rules of this court, seeking to sustain its claims under item 706.22 or 386.50, Tariff Schedules of the United States. The merchandise consists of cotton denim bags measuring approximately 16¼ inches wide by 17¾ inches long having a drawstring at the top. The bag has 6-inch by 6-inch patch pocket of the same material stitched to the bag as well as a cloth-backed plain plastic patch measuring 1¾ inches by 4 inches which is stitched directly above the pocket. Plaintiff contends the merchandise is prop-

erly subject to classification as luggage or handbags under item 706.22. Alternatively, plaintiff contends if the court determines the bags are not ornamented then they are claimed to be properly dutiable as other cotton articles not ornamented as provided for in item 386.50.

Defendant contends there are material issues of fact to be determined and hence the matter is not ripe for summary judgment. Alternatively, defendant cross moves for summary judgment and seeks to overrule the claims and dismiss the action.

There are two issues presented for determination. Is the merchandise luggage or handbags and is it ornamented? The former requires evidence that the merchandise was designed to contain clothing or personal effects during travel as provided in headnote 2(a)(i) of subpart D, part 1 of schedule 7 and has a secure closure. *Adolco Trading Corp.* v. *United States*, 71 Cust. Ct. 145, C.D. 4487 (1973); *Prepac, Inc.* v. *United States*, 78 Cust. Ct. 108, C.D. 4694 (1977). The affidavits submitted by both plaintiff and defendant do not settle this matter satisfactorily.

The question of ornamentation is likewise not satisfactorily settled by the affidavits submitted. The general rule as to whether an article is ornamented is a question of fact to be determined with reference to the particular article before the court. *Colonial Corp. of America* v. *United States*, 62 Cust. Ct. 502, C.D. 3815 (1969).

Plaintiff has alleged in its statement under rule 8.2(b) some 12 facts which are alleged not to be in issue and have been established by the pleadings and affidavits submitted. Defendant in opposition has alleged that issues of fact are involved in 9 of the 12 facts which plaintiff deems are not in issue.

The court is of the opinion that since there are material differences between plaintiff and defendant with respect to the relevant facts defendant should not be summarily cut off to its right to a full trial on the facts. *The American Greiner Electronic, Inc.* v. *United States*, 77 Cust. Ct. 164, C.R.D. 76-9 (1976).

The cross-motions for summary judgment are therefore denied.

(C.R.D. 79-16)

DAVID E. PORTER, PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Memorandum Opinion and Order Granting Plaintiff's Motion To Settle Record

Court No. 76-6-01448

[C.D. 4808 decided June 22, 1979; Cross-Appeals 79-30 and 80-1.]

(Dated December 7, 1979)

Arter Hadden & Hemmendinger (*Noel Hemmendinger* and *Barry E. Cohen* of counsel) for the plaintiff.

Alice Daniel, Assistant Attorney General (*Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation; *Madeline B. Kuflik*, trial attorney), for the defendant.

LANDIS, Judge: For the fourth time in less than six months, the Court is faced with a motion by plaintiff in *David E. Porter* v. *United States*, Court No. 76-6-01448, Cross-Appeals 79-30 and 80-1. On this occasion, plaintiff has moved for an order, pursuant to Customs Court Rule 13.1, to settle the record on appeal in this case. The defendant has deferred to the court's discretion.

As frequently happens, the question is essentially a simple one, but the parties, by their various pleadings, have complicated the issue.

A history of this case will be helpful.

In *David E. Porter* v. *United States*, 82 Cust. Ct. 259, C.D. 4808, 475 F. Supp. 688 (1979), in a decision dated June 22, 1979, on cross-motions for summary judgment, plaintiff's motion for summary judgment was granted and defendant's motion for summary judgment was denied.

The specific issue then was the classification of transverse rapid transit seats used exclusively in San Francisco Bay Area Rapid Transit (BART) rail vehicles. A full discussion of the competing tariff schedule item numbers involved and all the legal arguments appears in the decision in C.D. 4808. (It is noted, in view of plaintiff's argument given verbatim in the following paragraph here, that it is specifically stated in C.D. 4808 that "transverse seats are mounted at right angles to the direction of the vehicle's travel.") On August 15, 1979, the defendant filed an appeal of the decision to the U.S. Court of Customs and Patent Appeals, Appeal 79-30.

On August 7 1979, plaintiff moved, pursuant to Customs Court Rule 12.2, for an order amending the June 22, 1979 judgment entered in plaintiff's favor. The crux of plaintiff's argument appeared in one paragraph [Plaintiff's Motion To Amend Judgment, pp. 2, 3]:

> Upon review of the court's decision and the entry papers in this case, *counsel belatedly recognizes an oversight* in the merchandise described *in its summary judgment motion*. Although the merchandise embraced by the entries in litigation include transverse seats, window seats (both of which are mounted at a right angle to the direction of travel), and longitudinal seats (mounted in the direction of travel), *plaintiff's motion inadvertently addressed only the transverse seats. It should have included the window and longitudinal seats*, as these are similar in design to the transverse seats and are exclusively dedicated as parts of the BART rail vehicle. An affidavit of an official of Rohr Industries, the prime contractor for BART, attesting to these facts is attached. [Italic supplied.]

The defendant responded pursuant to rule 12.1(c), the court rule

dealing with responses to a motion for rehearing. However, the order of the court was simply to dismiss the motion to modify, which was plainly improper for many reasons. Had the court specifically sustained defendant's opposition instead of just dismissing plaintiff's motion to amend, the court could have been faced with what might be described as a labelling problem. Plaintiff had moved pursuant to rule 12.2(a) which concerns amendment of judgment due to "oversight". The defendant, as noted, answered under rule 12.1(c) dealing with responses to rehearing requests.

Of course, the "labelling" disagreement camouflaged a significant debate. If plaintiff's "oversight" label was correct, plaintiff's motion might have been timely because such "errors * * * arising from oversight * * * may be corrected by the court *at any time* * * * ." Rule 12.2(a), italic supplied. If the defendant's "rehearing" label was correct, plaintiff's motion was untimely, under both the following relevant statute and court rule.

The Statute (28 U.S.C. § 2639) provides:

> The judge who has rendered a judgment or order may, upon motion of a party or upon his own motion grant a retrial or a rehearing, as the case may be. A party's motion must be made or the judge's action on his own motion must be taken, not later than thirty days after entry of the judgment or order.

The rule, Customs Court Rule 12.1(a), provides:

> Form and Filing of Motions: All motions for rehearings or retrials must be in writing and filed with the clerk of the court at New York within 30 days from the entry of the judgment or order in the action in which rehearing or retrial is requested.

Thus, both the rule and statute require that a rehearing motion be filed not later than 30 days from the entry of judgment. Here judgment was entered on June 22, 1979. The plaintiff's motion was filed August 7, 1979, clearly not within the 30-day requirement.

According to the defendant, plaintiff's alleged "oversight" constituted false labeling. In its Opposition, the defendant argued:

> * * * The relief sought by plaintiff is for the court to broaden its decision in C.D. 4808 to include merchandise which was not included or considered in the original motion, even though plaintiff had the opportunity to seek adjudication of the classification of the other seats in the original motion. * * * The relief sought is more than the mere correction of a clerical error. It is a matter of substance affecting the substantial rights of the parties. * * * [Defendant's Opposition to Plaintiff's Motion to Amend Judgment, p. 2.]

The defendant relied heavily on *United States* v. *Torch Manufacturing Co., Inc.*, 62 CCPA 41, C.A.D. 1143, 509 F.2d 1187 (1975) and concluded that "this court lacks jurisdiction to reopen the judgment."

As above indicated, on September 13, 1979, the court issued the following order:

> Upon reading and filing plaintiff's motion to amend judgment, defendant's opposition thereto, and upon all other papers and proceedings had herein, it is hereby
>
> ORDERED that plaintiff's motion is DISMISSED.

Undaunted, the next day, September 14, 1979, plaintiff attempted to serve a "Motion for Partial, and Final, Summary Judgment." Plaintiff's papers were received by the clerk of the court on September 19, 1979, and the following day, they reached my chambers.

On September 25, I instructed the clerk to return these last papers as not within the contemplation of the court rules. The following day, September 26, 1979, the clerk mailed a "Notice of Rejection" stating the motion was "moot", and returned plaintiff's papers.

On October 4, 1979, plaintiff filed a cross-appeal with the Court of Customs and Patent Appeals, Appeal 80–1.

The aforementioned history forms the basis of plaintiff's present motion filed on November 1, 1979. The plaintiff has moved to settle the record, by incorporating in the record, the Clerk's Notice of Rejection. In other words, this entire case involves that single sheet of paper.

The defendant has deferred to the decision of the court, so obviously the easy course is simply to authorize the inclusion of the Clerk's Notice of Rejection in the record. Aside from the fact that this is the simplest resolution of this matter, there is something to be said generally for *inclusion* rather than *exclusion* from the record. Therefore, this is the course that has been chosen.

However, it should be noted that this order requested by plaintiff and being issued makes a matter of record plaintiff's motion to amend the June 22 decision, which motion was late, in fact 16 days late. There is no question but that plaintiff does not allege an "oversight" within the meaning of rule 12.2(a) dealing with "clerical mistakes." This rule doubtless refers to mistakes by the court in making up the record, not those of the litigants. Yet certainly, even if that is not the case, plaintiff's nonaction was not a "clerical mistake", within the meaning of the court rules. Thus, the order of September 13 was issued. It is also noted that ministerial records from the clerk usually are not included in the court record.

For these reasons, plaintiff's motion to thus settle the record is reluctantly granted and it is further ordered that the record as presently constituted, together with the Clerk's Notice of Rejection, be transmitted forthwith to the Clerk of the Court of Customs and Patent Appeals, pursuant to Customs Court Rule 13.1(c).

316-021 O - 80 - 12

(C.R.D. 79–17)

BENITO FERNANDEZ PANTOJA, AS FORMER DIRECTOR AND PRESIDENT OF MONTEZUMA OF FLORIDA, INC., A DISSOLVED FLORIDA CORPORATION, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 79–5–00747

[Motion to dismiss denied.]

(Dated December 11, 1979)

Morales, Rudolph & Hevia (*Jorge Hevia, Jr.* on the brief) for the plaintiff.
Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Jerry P. Wiskin* on the brief), for the defendant.

Opinion and Order

FORD, Judge: Defendant, pursuant to rules 4.7 and 4.12 of the rules of this court has filed a motion to dismiss the above-entitled action on the ground that the court lacks jurisdiction.

Plaintiff opposes defendant's motion on the ground that it filed a protest on February 8, 1977. The alleged protest filed on said date is a "Discrepancy Report and Declaration" required by 19 CFR 18.6(c). Defendant denies the discrepancy report and declaration constitutes a protest within the meaning of section 514 of the Tariff Act of 1930 and Customs Regulations, 19 CFR 174.13. In any event, defendant brought to the attention of the court that the entry was liquidated on November 11, 1977, and consequently the alleged protest filed on February 8, 1977, is premature.

The court in reviewing the papers in this matter observed a photocopy of a letter dated October 30, 1978, from the district director of Customs at Miami, Fla., to counsel for plaintiff which reads as follows:

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Miami, Fla., October 30, 1978.

JORGE HEVIA, Jr., Attorney,
Miami, Fla.

DEAR MR. HEVIA: Reference is made to your letter of January 20, 1978, requesting a refund of duties and internal revenue tax for 673 cartons of sparkling wine, that were found to be short in container No. 399368.

This office has reviewed the file of this importation and the circumstances revolving around the shortage of the wine. The ocean bill of lading indicates that there were 1,100 cartons in the container with corresponding weights. The container was delivered to Moctezuma of Florida, Inc., on January 21, 1977. On January 24, 1977, the seal was broken by Customs and at that time the shortage was discovered.

In the absence of evidence that the merchandise was not shipped by the shipper or not landed, Customs must assume that the total amount of 1,100 cartons were landed in the United States. In accordance with section 141.1 of 19 CFR, chapter 1, the importer of record is liable for all duty and taxes of imported merchandise. An allowance for deficiencies in contents of packages may be allowed under section 158.5 of 19 CFR, chapter 1, if the district director is satisfied of the validity of the importers claim of shortage. In the instant case, no proof has been submitted that 673 cartons of sparkling wine were not shipped or landed in the United States, and as stated previously, section 141.1 of 19 CFR, chapter 1, would apply.

In view of the above, this office has no alternative but to deny your claim for refund of duties.

Sincerely yours,

DOUGLAS D. ANGLE,
District Director.

The reference to letter of counsel for plaintiff of January 20, 1978, prompted the court on November 8, 1979, to order the district director to forward to the court the letter or a photocopy of the letter of January 20, 1978, showing date of receipt. On December 2, 1979, a copy of a copy of the letter was received together with a letter of transmittal indicating the original letter could not be located and that the records of the district director do not indicate date of receipt. A copy of the letter received reads as follows:

A. KOSS, ATTORNEY AT LAW, P.A.,
Coral Gables, Fla., January 20, 1978.

Re CE726026 dated January 14, 1977, imported by Moctezuma of Florida, Inc.

RICHARD T. MESSICK,
Senior Import Specialist, Department of the Treasury, U.S. Customs Service, Miami, Fla.

DEAR MR. MESSICK: As you might be aware, this office represents Benito Fernandez Pantoja and his firm, Moctezuma de Florida, Inc.

We are somewhat surprised with your letter of November 29, 1977, copy attached. It is true that the importer is responsible for the duties and taxes. However, it cannot be assumed in this case that the 1,100 cases of sparkling wine (see photo attached) arrived since inspector E. K. Rawls noted, as you will appreciate that there were "427 cases only in container 399368."

Inspector Rawls made the statement after he personally opened the sealed containers.

Therefore, we respectfully request again a refund in the amount of $7,074.36 for the 673 cartons missing. We are sure there is some misunderstanding here since the fisc is only interested in collecting its share of the duties.

We shall add again, as Customs has been advised, that the carrier has been unwilling to cooperate.

Very truly yours,

The question thus presented to the court is whether the letter constitutes a protest and whether it was timely filed.

Jurisdiction of this court is set forth in 28 U.S.C. 1582(a) which provides so far as is pertinent herein that this court "shall have exclusive jurisdiction of civil action instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate Customs officer. * * *"

Section 514(a)(3) provides that decisions of the appropriate Customs officer including the legality of all orders and finding with respect to "all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury" are final and conclusive unless a protest is filed or a civil action is instituted pursuant to 28 U.S.C. 2632 within 180 days, 28 U.S.C. 2631, of the denial of a protest. Section 514(2), Tariff Act of 1930, requires the filing of a protest within 90 days from the date of liquidation.

The entry was liquidated on November 11, 1977, and the letter of counsel for plaintiff is dated January 20, 1978.

The court is aware of the fact that the letter of counsel for plaintiff was addressed to a senior import specialist rather than the district director. However, the court notes the reply was from the district director in which the facts of the importation and the claim were acknowledged.

It has long been a cardinal rule in construing a protest that it need not be made with technical precision as long as the importer indicates distinctly and definitely the source of the complaint and his intention to make it the basis of his claim against the government. *Greeley's Administrator* v. *Burgess* (*Converse* v. *Burgess*), 59 U.S. 413.

In *Arthur* v. *Morgan*, 112 U.S. 495, the Supreme Court made the following observation:

> * * * A protest which indicates to an intelligent man the ground of the importer's objection to the duty levied upon the articles should not be discarded because of the brevity with which the objection is stated. [*Schell's Executors* v. *Fauché*, 138 U.S. 562.]

In addition to the foregoing, in instances such as in the case at bar, where the claim is obvious, a failure to state specific provisions of law is not fatal to the sufficiency of a protest. *How-Tex Peanut Company, Inc.* v. *United States*, 54 Cust. Ct. 316, Abs. 69066 (1965). In the case of *United States* v. *Eaton Mfg. Co.*, 60 CCPA 23 (1972), the court stated: "The denial of jurisdiction for insufficiency of protest is a severe action which should be taken sparingly." The construction above is indicative of the fact that the protest is sufficient notice to the district director of the intended claim.

It is also apparent that the claim for refund of duty and internal revenue tax is within the jurisdiction of the Secretary of Treasury.

The question as to whether the letter was timely received, since the office of the district director is unable to locate the original letter and cannot by records attest to the date of receipt is next considered. The letter dated January 20, 1978, was answered on October 30, 1978, and was accordingly received. The office of counsel for plaintiff is in Coral Gables, Fla., and the district director is in Miami, Fla., a distance of under 10 miles, according to the Rand McNally map contained in the "Standard Highway Guide." With all due respect to the efficiency of the Postal Service, occasions do arise when properly addressed mail is delayed or diverted from its appointed course. However, there is a strong presumption that letters entrusted to the mails reach their destination in the ordinary course of time. *Dunlop* v. *United States*, 165 U.S. 486. Even considering the delays in the mails, it can be presumed that delivery was accomplished within 19 days or prior to February 8, 1978, which is 90 days from the date of liquidation.

A further examination of the papers also indicates that a summons instituting the action in this court was timely filed.

The court having jurisdiction in this matter therefore denies defendant's motion to dismiss for lack of jurisdiction. This action should be noticed for trial for determination on the merits.

(C.R.D. 79-18)

AIRCO, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Memorandum to Accompany Order

Court No. 76-3-00643

[Motion for substitution as party-plaintiff granted.]

(Dated December 19, 1979)

Frederick L. Ikenson for the plaintiff.

Alice Daniel, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch (*Sheila N. Ziff* on the briefs), for the defendant.

RICHARDSON, Judge: Macalloy Corp., the successor to Airco, Inc., in Charleston, S.C., seeks to be substituted as party plaintiff in the above-mentioned action. The defendant opposed the substitution, contending in substance that because the transfer documents do not recite specifically that "a chose in action" is being transferred to Macalloy Corp. it cannot be substituted for Airco, Inc., in this litigation.

It is clear from plaintiff's exhibit A, "Agreement For Purchase and Sale of Assets," and exhibit D, "Bill of Sale" of Airco, Inc.'s plant

which was producing high-carbon ferrochrome at its Charleston, S.C., facility; exhibit 1, "Affidavit of Angelo N. Tarallo, Assistant Vice President of Airco, Inc."; exhibit 2, "Affidavit of Hanno D. Mott, Secretary and Director of Macalloy Corp."; and the other exhibits submitted by counsel for Airco, Inc., that the right of Macalloy Corp., to be substituted for Airco, Inc., in this action was included in the bill of sale.

The bill of sale recites "that all assets * * * whether now owned or hereafter acquired, whether tangible or intangible, * * * are sold to the purchaser." A company's claim being made in pending litigation at the time the company is sold is an intangible asset. Exhibit G to the agreement for purchase and sale specifically mentions this litigation.

Mr. Tarallo of Airco, Inc., in his affidavit, states that he was a principal negotiator and draftsman for Airco, Inc., of the agreement of sale and "that (1) it was the intent of Airco, Inc., to convey its interest, rights, and obligations in this litigation, subject to the court's approval, to Macalloy Corp. and to no one else; and (2) Airco, Inc., has not retained any ferrochrome inventory or other interest in, ferrochrome. Airco, Inc., is not at this time a manufacturer, wholesaler, or producer of ferrochrome."

Mr. Mott of Macalloy Corp., in his affidavit, asserts that "* * * it was the clear intent of the parties that all of the assets, properties, and business of Airco's Charleston operation, whether tangible or intangible * * * were to be conveyed and transferred by Airco to Macalloy. * * * Among the assets to be transferred to Macalloy were all of Airco's rights and interest in the above-captioned litigation."

The excerpts from the above-mentioned exhibits make it clear that the documents of transfer purported to transfer and it was intent of the seller and purchaser to transfer from Airco, Inc., to Macalloy Corp. all of Airco, Inc.'s rights and interest in this litigation and that it is appropriate that Macalloy Corp. be substituted for Airco, Inc., as party plaintiff.

ABSTRACTS OF CUSTOMS COURT DECISIONS

Protests

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P79/116	Watson, J. July 9, 1979	L. Batlin & Son Inc.	66/41688, etc.	Item 748.20 28%	Item 772.15 17%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.D. 3279)	New York Shower curtain hooks or holders, etc.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P79/117	Watson, J. July 9, 1979	Zunold Trading Corp.	66/21233-A, etc.	Item 748.20 28% (items marked "A" and "B")	Item 774.60 17% (items marked "A" and "B")	Armbee Corporation et al. v. U.S. (C.D. 3278); Zunold Trading Corporation et al. v. U.S. (C.D. 3279) (items marked "A") Joseph Markovits, Inc. v. U.S. (C.D. 4396) (items marked "B")	New York Artificial flowers, etc. (items marked "A"); ferns (items marked "B")
P79/118	Boe, J. July 9, 1979	International Mercantile Corp.	69/51331, etc.	Item 544.51 26.5%	Item 688.40 9%	The Englishtown Corporation v. U.S. (C.A.D. 1187)	San Diego Make-up mirror with lights
P79/119	Boe, J. July 9, 1979	New York Merchandise Co., Inc.	69/31964, etc.	Item 544.51 20.5% or 26.5%	Item 688.40 10% or 9%	The Englishtown Corporation v. U.S. (C.A.D. 1187)	San Diego Make-up mirror with lights
P79/120	Landis, J. July 17, 1979	C. H. Powell Company	75-10-02687	Item 332.40 15%	Item 355.65 8.5%	Bruce Duncan Co., Inc. v. U.S. (C.D. 4736)	Boston Woven fabrics coated with polyamide dots
P79/121	Landis, J. July 17, 1979	C. H. Powell Company	76-3-00850	Item 332.40 15%	Item 355.65 8.5%	Bruce Duncan Co., Inc. v. U.S. (C.D. 4736)	Boston Woven fabrics coated with polyamide dots
P79/122	Landis, J. July 17, 1979	C. H. Powell Company	76-3-00851	Item 332.40 15%	Item 355.65 8.5%	Bruce Duncan Co., Inc. v. U.S. (C.D. 4736)	Boston Woven fabrics coated with polyamide dots
P79/123	Landis, J. July 17, 1979	C. H. Powell Company	76-9-01984	Item 332.40 15%	Item 355.65 8.5%	Bruce Duncan Co., Inc. v. U.S. (C.D. 4736)	Boston Woven fabrics coated with polyamide dots

P79/124	Watson, J. July 26, 1979	Corham Artificial Flower Co.	72-7-01577	Item 748.20 28%, 26.5%, 25%, 23.5%, 22% or 21%	Item 774.60 13.5% or 11.5%	Armbee Corporation et al. v. U.S. (C.D. 3278) First American Artificial Flowers, Inc. v. U.S. (C. D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4396)	Los Angeles Artificial flowers, etc.
P79/125	Watson, J. July 27, 1979	Seaway Importing Company	77-1-00090	Item 389.60 25¢ per lb. + 15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	San Francisco Backpacking tents
P79/126	Watson, J. July 27, 1979	Sunshine Cover & Tarp, Inc.	78-11-01940	Item 389.62 25¢ per lb. + 15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Los Angeles Backpacking tents
P79/127	Watson, J. July 27, 1979	World Famous Sales	76-2-00444	Item 389.60 25¢ per lb. + 15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Chicago Backpacking tents
P79/128	Boe, J. July 27, 1979	New York Merchandise Co., Inc.	75-12-03260	Item 544.51 17.5%	Item 688.40 5.5%	The Englishtown Corporation v. U.S. (C.A.D. 1187)	San Diego E3/1467 plastic mirror lites in vinyl pouches; electrical articles
P79/129	Boe, J. July 27, 1979	Sun Coast Merchandise Corp.	72-2-00274	Item 544.51 23.5%	Item 688.40 8%	The Englishtown Corporation v. U.S. (C.A.D. 1187)	Los Angeles MG-483 plastic frame portable lite mirrors, electrical articles
P79/130	Ford, J. July 30, 1979	The Wing On Company, Inc.	76-6-01348	Item 653.37 9.5%	Item 653.35 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	San Francisco Brass candlesticks
P79/131	Watson, J. July 30, 1979	M. Adler's Son, Inc.	73-3-00764	Item 748.20 28%, 26.5%, 25%, 23.5%, 22% or 21%	Item 774.60 8.5%	Armbee Corporation et al. v. U.S. (C.D. 3278) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4396)	New York Artificial flowers, etc.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P79/132	Watson, J. July 30, 1979	World Famous Sales Co.	76-11-02503, etc.	Item 389.60 25¢ per lb.+ 15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Chicago Backpacking tents
P79/133	Newman, J. July 30, 1979	Huk-A-Poo Sportswear, Inc.	78-9-01681	Item 382.81 27.5%+25¢ per lb.	Exempt from duty	Agreed statement of facts	New York Women's woven shirts of manmade fibers; products of Guam
P79/134	Boe, J. July 30, 1979	Clairol, Inc.	76-5-01129, etc.	Items 544.51/ 807.00 17.5% upon full value of merchandise less cost or value of prefabricated U.S. manufactured components	Items 688.40/ 807.00 5.5% upon full value of imported merchandise, less cost or value of prefabricated U.S. manufactured components found applicable upon liquidation of merchandise	The Englishtown Corporation v. U.S. (C.A.D. 1187)	New York Electrical makeup appliances incorporating mirrors, lights and other features (models [C]LM2, LM3 and [C]LM5)
P79/135	Boe, J. July 30, 1979	New York Merchandise Co., Inc.	69/51322, etc.	Item 544.51 26.5%	Item 688.40 9%	The Englishtown Corporation v. U.S. (C.A.D. 1187)	San Diego K1/247 illumination cosmetic mirrors with stands, battery operated; or car visor mirrors with 2 bulbs; electrical articles

P79/136	Watson, J. July 31, 1979	Hartfield-Zody's, Inc.	77-3-00386	Item 389.60 25¢ per lb. + 15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Los Angeles Nylon tents
P79/137	Watson, J. July 31, 1979	M. Adler's Son, Inc.	71-4-00021	Item 748.20 28%, 26.5%, 25%, 23.5%, 22% or 21%	Item 774.60 11.5%	Armbee Corporation et al. v. U.S. (C.D. 3278) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4396)	New York Artificial flowers, etc.
P79/138	Watson, J. July 31, 1979	Joseph Markovits, Inc.	72-5-01177, etc.	Item 748.20 28%, 26.5%, 25%, 23.5%, 22% or 21%	Item 774.60 10% or 8.5%	Armbee Corporation et al v. U.S. (C.D. 3278) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4396)	New York San Francisco Artificial flowers, etc.
P79/139	Watson, J. July 31, 1979	Mobay Chemical Corp.	76-2-00389, etc.	Item 405.25 9% + 1.4¢ per lb.	Item 494.60 2.5%	Naftone, Inc. v. U.S. (C.D. 4578, aff'd C.A.D. 1166)	New York Desmocoll 400 and other grades of Desmocoll; hydroxylated polyurethane products
P79/140	Watson, J. July 31, 1979	Seaway Importing Co. et al.	75-9-02278, etc.	Item 389.60 25¢ per lb. +15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	San Francisco Backpacking tents
P79/141	Maletz, J. July 31, 1979	Lloyd's Electronics Int'l.	78-7-01312, etc.	Item 735.20 10%	Item 734.20 5.5%	APF Electronics Inc. v. U.S. (C.D. 4784)	Los Angeles T.V. Game Player Machines
P79/142	Newman, J. July 31, 1979	Associated Merchandising Corp.	75-8-01997, etc.	Item 653.37 13%, 11% or 9.5%	Item 655.35 7%, 6% or 5%	U.S. v. Morris Friedman & Co. (C.A.D.'s 1156, 1157)	New York Brass candlesticks or candleholders

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P79/143	Watson, J. August 2, 1979	Entex Industries	78-3-00516, etc.	Item 735.20 10%	Item 734.20 5.5%	APF Electronics Inc. v. U.S. (C.D. 4784)	Los Angeles T.V. Game Player Machines
P79/144	Newman, J. August 2, 1979	Hallmark Cards, Incorporated	75-5-01231	Item 737.90 17.5%	Item 737.52 Free of duty	Summary judgment	Kansas City (St. Louis) Flip books
P79/145	Watson, J. August 15, 1979	Marubeni America Corp.	75-4-00896	Item 685.30 6.5%	Item 678.50 5%	Montgomery Ward & Co. v. U.S. (C.D. 4573)	New York Mida Brand Radio Receiver with 8-Track Player (model No. 2071Z)
P79/146	Maletz, J. August 15, 1979	APF Electronics Inc.	78-3-00380, etc.	Item 735.20 10%	Item 734.20 5.5%	APF Electronics Inc. v. U.S. (C.D. 4784)	Los Angeles T.V. Games
P79/147	Maletz, J. August 15, 1979	APF Electronics Inc.	78-11-02068, etc.	Item 735.20 10%	Item 734.20 5.5%	APF Electronics Inc. v. U.S. (C.D. 4784)	Los Angeles T.V. Games
P79/148	Newman, J. August 15, 1979	John P. O'Hara, Jr.	78-12-02275	Item 534.94 70%—col. 2 rate claimed inapplicable by plaintiff	Classification affirmed; action dismissed	Judgment on the pleadings	Oakland Two ceramic horses imported from the People's Republic of China
P79/149	Boe, J. August 15, 1979	New York Merchandise Co., Inc.	72-3-00527, etc.	Item 544.51 20.5% or 23.5%	Item 688.40 6.5% or 8%	The Englishtown Corporation v. U.S. (C.A.D. 1187)	Portland, Oreg.; San Diego Make-up mirrors with lights

P79/150	Re, C. J. August 23, 1979	Marubeni American Corp.	75-8-02013	Item 692.35 5.5%	Item 692.30 Free of duty	Agreed statement of facts	Los Angeles Parts of tractors suitable for agricultural use
P79/151	Watson, J. August 23, 1979	Hub Floral Corporation	72-10-02197	Item 748.20 28%, 25%, 23.5% or 22%	Item 774.60 17%, 13.5%, 11.5% or 10%	Armbee Corporation et al. v. U.S. (C.D. 4378) Zunold Trading Corporation et al. v. U.S. (C.D. 3279) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185)	Boston Artificial flowers, etc.
P79/152	Maletz, J. August 23, 1979	APF Electronics Inc.	78-2-00320	Item 735.20 10%	Item 734.20 5.5%	APF Electronics Inc. v. U.S. (C.D. 4784)	Honolulu T.V. Games
P79/153	Maletz, J. August 23, 1979	John V. Carr & Son, Inc.; Paccar Inc., d/b/a Dynacraft Company	72-10-02148	Item 772.65 5% Item 948.00 10% additional duty pursuant to Pres. Proc. 4074	Item 772.66 Free of duty	John V. Carr & Son, Inc., et al. v. U.S. (C.D. 4652)	Port Huron (Detroit) Various types of hose; Canadian articles and original motor-vehicle equipment
P79/154	Watson, J. August 30, 1979	Veneteanaire Corp. of America	67/37833, etc.	Item 748.20 28%	Item 772.15 17%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporational et al. v. U.S. (C.D. 3279)	New York Shower curtain hooks or holders in c.v. of plastic
P79/155	Maletz, J. August 30, 1979	Amico, Inc.	73-11-03156, etc.	Item 737.80 22% Item 737.20 17.5%	Item 725.50 8%	Amico, Inc. v. U.S. (C.A.D. 1214)	Philadelphia Music boxes

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P79/156	Maletz, J. August 30, 1979	John V. Carr & Son, Inc.; Pacear Inc., d/b/a Dynacraft Company	72-10-02167, etc.	Item 772.65 4% or 5% Item 948.00 10% additional duty pursuant to Pres. Proc. 4074	Item 772.66 Free of duty	John V. Carr & Son, Inc., et al. v. U.S. (C.D. 4652)	Port Huron (Detroit) Various types of hose; Canadian articles and original motor-vehicle equipment
P79/157	Maletz, J. August 30, 1979	John V. Carr & Son, Inc.; Pacear Inc., d/b/a Dynacraft Company	73-6-01401, etc.	Item 772.65 4% or 5%	Item 772.66 Free of duty	John V. Carr & Son, Inc., et al. v. U.S. (C.D. 4652)	Port Huron (Detroit) Various types of hose; Canadian articles and original motor-vehicle equipment
P79/158	Maletz, J. August 30, 1979	John V. Carr & Son, Inc.; Pacear Inc., d/b/a Dynacraft Company	74-7-01691, etc.	Item 772.65 4%	Item 772.66 Free of duty	John V. Carr & Son, Inc., et al. v. U.S. (C.D. 4652)	Port Huron (Detroit) Various types of hose; Canadian articles and original motor-vehicle equipment
P79/159	Boe, J. September 6, 1979	Clairol, Inc.	75-9-02271, etc.	Items 544.51/ 807.00 20.5% or 17.5% upon full value of merchandise less cost or value of prefabricated U.S. manufactured components	Items 688.40/ 807.00 6.5% or 5.5% upon full value of imported merchandise described as model LM4 imported in 1971 and entered in	The Englishtown Corporation v. U.S. (C.A.D. 1187)	New York Electrical makeup appliances incorporating mirrors, lights and other features (models LM1, [C]LM2, [C]LM3, LM4, [C]LM5)

Item 544.51 20.5% or 17.5% upon full value of merchandise					1972; upon full value of imported merchandise, less cost or value of prefabricated U.S. manufactured components contained in models [C]LM2, [C]LM3, LM4 imported in 1973, and [C]LM5 which were found applicable upon liquidation of merchandise; and upon full value of imported merchandise, less cost or value ($1.45224 and $1.38605 each, respectively) of prefabricated U.S. components contained in models LM1 and [C]LM3 imported in 1971	

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P79/160	Watson, J. September 11, 1979	Rice Bayersdorfer Co.	67/3412-S	Item 748.20 28%	Item 774.60 17%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.D. 3279)	Philadelphia Artificial flowers, etc.
P79/161	Maletz, J. September 20, 1979	APF Electronics, Inc.	79-1-00108, etc.	Item 735.20 10%	Item 734.20 5.5%	APF Electronics Inc. v. U.S. (C.D. 4784)	New York "T.V. Games"
P79/162	Richardson, J. September 24, 1979	Parker-Hannifin Corp.	70/84063	Item 649.43 27%	Item 800.00 Free of duty	Agreed statement of facts	Cleveland American goods returned; tools
P79/163	Watson, J. September 24, 1979	Bar-Zel Expediters, Inc., a/c Alpha Sales Co., Inc.	74-6-01584	Item 389.60 25¢ per lb.+ 15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	New York Nylon tents
P79/164	Maletz, J. September 24, 1979	APF Electronics Inc.	78-1-00080	Item 735.20 10%	Item 734.20 5.5%	APF Electronics Inc. v. U.S. (C.D. 4784)	New York "T.V. Games"
P79/165	Maletz, J. September 24, 1979	John V. Carr & Son, Inc.; Paccar Inc., d.b.a. Dynacraft Company	76-7-01744, etc.	Item 772.65 4%	Item 772.66 Free of duty	John V. Carr & Son, Inc., et al. v. U.S. (C.D. 4652)	Port Huron (Detroit) Various types of hose; Canadian articles and original motor-vehicle equipment
P79/166	Maletz, J. September 24, 1979	John V. Carr & Son, Inc.; Paccar Inc., d.b.a. Dynacraft Company	77-8-01806	Item 772.65 4%	Item 772.66 Free of duty	John V. Carr & Son, Inc., et al. v. U.S. (C.D. 4652)	Detroit Various types of hose; Canadian articles and original motor-vehicle equipment

P79/167	Richardson, J. September 27, 1979	Almac Industries Ltd.	77-10-04381	Item 945.60 25%	Item 692.27 4% (trailers) Truck-tractors are instruments of international traffic and not dutiable	Agreed statement of facts	Champlain-Rouses Point (Ogdensburg) Automobile trailers imported from Canada pulled by automobile truck-tractors of American origin
P79/168	Watson, J. September 27, 1979	Hub Floral Corporation	73-9-02583	Item 748.20 26.5%, 22% or 21%	Item 774.60 15%, 10% or 8.5%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.D. 3279) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185)	Boston Artificial flowers, etc.
P79/169	Maletz, J. September 27, 1979	Dynacraft Corporation (correctly designated Paccar Inc., d.b.a. Dynacraft Company)	70/64074, etc.	Item 772.65 5.5%	Item 772.66 Free of duty	John V. Carr & Son, Inc., et al. v. U.S. (C.D. 4652)	Detroit Various types of hose; Canadian articles and original motor-vehicle equipment
P79/170	Richardson, J. October 4, 1979	F. W. Woolworth Co.	77-4-00553	Item 748.20 21%	Item A748.20 Free of duty	Agreed statement of facts	San Francisco Articles ("fruit string assortment") produced within Hong Kong
P79/171	Richardson, J. October 4, 1979	F. J. Strauss Co., Inc.	77-12-04901	Item 737.95 17.5%	Item A737.80 Free of duty	Agreed statement of facts	New York Strasco gyro-powered speedboats imported from Hong Kong
P79/172	Richardson, J. October 10, 1979	Harben Company	74-8-02280, etc.	Items 651.75/ 772.80 10¢ per lb. + 8.5%	Items 651.75/ 551.31 11%	Agreed statement of facts	Chicago Screwdriver sets

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P79/173	Richardson, J. October 10, 1979	Sumitomo Shoji America, Inc.	78-11-01974	Item 692.35 5.5%	Item 692.30 Free of duty	Agreed statement of facts	Chicago Link draft forgings; parts of tractors for agricultural use
P79/174	Maletz, J. October 10, 1979	Shayne Knitwear, Inc.	77-3-00474	Item 382.58 37.5¢ per lb.+ 20% (blouses and pants) Item 791.75 6% (jackets)	Item 791.75 6% Dutiable as entireties on basis of export value; said value is invoice unit price	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Ladies three-piece sets (jackets, blouses and pants); entireties
P79/175	Maletz, J. October 10, 1979	Shayne Knitwear, Inc.	77-9-03777	Item 382.50 37.5¢ per lb.+ 20% (blouses and pants) Item 791.75 6% (jackets)	Item 791.75 6% Dutiable as entireties on basis of export value; said value is invoice unit price	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Ladies three-piece sets (jackets, blouses and pants); entireties
P79/176	Re, C.J. October 18, 1979	Olympia Sports Co. Inc.	76-9-02195	Item 705.85 or 705.35 15% (items marked "A") Item 705.50 25% (items marked "B")	Item 735.05 7.5% (items marked "A" and "B")	Agreed statement of facts (items marked "A") David E. Porter v. U.S. (C.D. 4641) (items marked "B")	New York Men's cowhide ski mittens, style No. 5003 (items marked "A") Leather gloves, style Nos. 600 and 604 (items marked "B")

P79/177	Watson, J. October 18, 1979	Cabot Corp., C. H. Powell Co., Stellite Div. of Cabot Corp.	77-4-00660	Item 629.07 7.5%	Items 629.08/ 911.12 Free of duty	Agreed statement of facts	Boston Tantalum materials and articles of metal; second-hand or waste or refuse, fit only for use in manufacture of chemicals
P79/178	Maletz, J. October 18, 1979	Coleco Industries, Inc.	78-2-00246, etc.	Item 735.20 10%	Item 734.20 5.5%	APF Electronics Inc. v. U.S. (C.D. 4784)	Albany (New York) Pistol assemblies for Telstar T.V. games
P79/179	Maletz, J. October 18, 1979	Mim Lador, Inc.	79-5-00896	Item 737.80 22%	Item 725.50 8%	Amico, Inc. v. U.S. (C.A.D. 1214)	New York Music boxes with earthen see-saw figurines, etc.
P79/180	Watson, J. October 19, 1979	Mobay Chemical Co.	75-3-00716	Item 405.25 9%+1.4¢ per lb.	Item 404.60 2.5%	Naftone, Inc. v. U.S. (C.D. 4578, aff'd C.A.D. 1166)	San Francisco Desmocoll 400, etc.
P79/181	Watson, J. October 23, 1979	World Famous Sales Co. et al.	76-8-01904, etc.	Item 689.60 25¢ per lb. + 15%	Item 735.20 10%	The Newman Importing Co., Inc. v U.S. (C.D. 4648)	Seattle Nylon backpacking tents
P79/182	Newman, J October 23, 1979	Korvettes, Division of Arlen Realty and Development Corp.	77-11-04588	Item 737.20 17.5%	Item 688.40 5.5%	Janex Corp. v. U.S. (C.D. 4748)	New York "Raggedy Ann and Andy Nite Timers"
P79/183	Watson, J. October 25, 1979	Fairfield Gloves, Co.	76-3-00546	Item 705.86 35%	Item 705.85 15%	Agreed statement of facts	Los Angeles Gloves of rubber or plastics with textile fabrics fourchettes
P79/184	Watson, J. October 25, 1979	World Famous Sales Co.	76-3-00714	Item 389.60 25¢ per lb.+ 15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Los Angeles Nylon backpacking tents

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P79/185	Maletz, J. October 25, 1979	Amico, Inc., Div. of LCA	76-3-00902	Item 737.80 22%	Item 725.50 8%	Amico, Inc. v. U.S. (C.A.D. 1214)	Philadelphia Musical kissing angels, boy and girl
P79/186	Watson, J. October 29, 1979	California Merchandise Co.	77-7-01247	Item 790.70 7%	Item A790.70 Free of duty	Judgment on the pleadings	Los Angeles Human hair wigs
P79/187	Watson, J. October 29, 1979	Creative Playthings, Division of Columbia Broadcasting System, Inc.	76-5-01064	Item 737.90 17.5%	Item 737.55 10.5%	Judgment on the pleadings Creative Playthings, Division of Columbia Broadcasting System, Inc. v. U.S. (C.D. 4754)	New York Toy cloth blocks or bricks
P79/188	Boe, J. October 29, 1979	Consolidated Merchandising Corp.	73-1-00322	Item 544.51 20.5%	Item 688.40 8%	Summary judgment The Englishtown Corporation v. U.S. (C.A.D. 1187)	New York "Lady Webcor" electric make-up mirrors
P79/189	Watson, J. October 31 1979	Bell & Howell Company	76-6-01392	Item 708.23 12.5%	Items 806.20/ 708.23 12.5% upon full value of repairs or alterations performed abroad which is $681	Agreed statement of facts	Chicago P/NO 43604 zoom lens assembly
P79/190	Watson, J. October 31, 1979	K Mart Corporstion	78-11-02064	Item 737.95 17.5%	Item A737.15 Free of duty	Agreed statement of facts	New York Models to a scale larger than 1 to 85, produced within Hong Kong
P79/191	Watson, J. October 31, 1979	WFS Div. Amer. Rec. Grp., Ltd.	78-10-01732	Item 389.60 25¢ per lb.+ 15%	Item 735.20 10%	The Newman Importing Co. v. U.S. (C.D. 4648)	Boston Nylon backpacking tents

	October 31, 1979	Grp., Ltd.		25¢ per lb.+ 15%	10%	Co. v. U.S. (C.D. 4648)	Nylon backpacking tents
P79/192	Maletz, J. October 31, 1979	APF Electronics Inc.	78-7-01267, etc.	Item 735.20 10%	Item 734.20 5.5%	APF Electronics Inc. v. U.S. (C.D. 4784)	New York "T.V. Games"
P79/193	Maletz, J. October 31, 1979	The Harben Company	75-4-00943	Item 737.80 22%	Item 725.50 8%	Amico, Inc. v. U.S. (C.A.D. 1214)	Chicago Music boxes
P79/194	Maletz, J. October 31, 1979	Nadel Trading Corp.	78-4-00712	Item 737.95 17.5%	Item 734.20 Free of duty pursuant to Generalized System of Preferences by virtue of Ex. Order No. 11888 of 11/24/75	Mego Corp. v. U.S. (C.A.D. 1127)	New York Pin ball games; product of an eligible beneficiary country
P79/195	Maletz, J. October 31, 1979	North American Foreign Trading Corporation	78-7-01372	Item 735.20 10%	Item 734.20 5.5%	APF Electronics Inc. v. U.S. (C.D. 4784)	Chicago T.V. game machines
P79/196	Maletz, J. October 31, 1979	North American Foreign Trading Corporation	78-11-01980, etc.	Item 735.20 10%	Item 734.20 5.5%	APF Electronics Inc. v. U.S. (C.D. 4784)	New York T.V. game machines
P79/197	Maletz, J. October 31, 1979	Sabrina Knits, Ltd.	77-2-00152, etc.	Classified and appraised separately as set forth in schedule B attached to decision and judgment (jackets, dresses, jacket-pants, blouses, jumpsuits)	Item 772.30 12.5% (sets classifiable as entireties) Dutiable as entireties on basis of export value; said value is sum of separate invoice unit values	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Ladies 3-piece suits, 2-piece pantsuits, and/or 2-piece suits; entireties

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P79/198	Boe, J. October 31, 1979	Enerco, Inc.	79-4-00618, etc.	Item 475.05 0.125¢ per gal. Item 475.10 0.25¢ per gal.	Not subject to duty under TSUS because it was never imported into U.S.	Hawaiian Independent Refinery v. U.S. (C.D. 4777)	Honolulu Light and heavy gas oil, testing both over and under 25° A.P.I. gravity, manufactured in Foreign Trade Subzone 9A, Honolulu, from crude oil having the status of non-privileged foreign merchandise
P79/199	Boe, J. October 31, 1979	Hawaiian Independent Refinery	79-4-00649, etc.	Item 475.05 0.125¢ per gal. Item 475.10 0.25¢ per gal.	Not subject to duty under TSUS because it was never imported into U.S.	Hawaiian Independent Refinery v. U.S. (C.D. 4777)	Honolulu Light and heavy gas oil, testing both over and under 25° A.P.I. gravity, manufactured in Foreign Trade Subzone 9A, Honolulu, from crude oil having the status of non-privileged foreign merchandise
P79/200	Watson, J. November 13, 1979	S. S. Kresge Co.	77-7-01161	Item 389.60 25¢ per lb. + 15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Longview (Portland, Oreg.) Tents
P79/201	Watson, J. November 13, 1979	Rollei of America	77-12-04065	Item 708.25 20%	Item 722.34 10%	Agreed statement of facts	New York Penta prisms; parts of cameras

P79/202	Maletz, J. November 13, 1979	APF Electronics Inc.	77-7-01140-8, etc.	Item 735.20 10%	Item 734.20 5.5%	APF Electronics Inc. v. U.S. (C.D. 4784)	Chicago T.V. games
P79/203	Maletz, J. November 13, 1979	Granada Electronics	79-8-00437	Item 735.20 10%	Item 734.20 5.5%	APF Electronics Inc. v. U.S. (C.D. 4784)	New York T.V. game machines
P79/204	Maletz, J. November 13, 1979	Lafayette Radio Electronics Corp.	78-12-02276	Item 735.20 10%	Item 734.20 5.5%	APF Electronics Inc. v. U.S. (C.D. 4784)	Los Angeles T.V. game machines
P79/205	Maletz, J. November 13, 1979	Nadel & Sons Toy Corp.	78-1-00056	Item 737.90 17.5%	Item 734.20 5.5%	Mego Corp. v. U.S. (C.A.D. 1137)	New York "Plastic slot machine game"
P79/206	Watson, J. November 14, 1979	Rollei of America, Inc.	78-9-01506	Item 708.25 20%	Item 722.34 10%	Agreed statement of facts	New York Prisms; parts of cameras
P79/207	Boe, J. November 19, 1979	Hawaiian Independent Refinery	74-9-02332, etc.	Item 475.05 0.125¢ per gal. Item 475.10 0.25¢ per gal.	Not subject to duty under TSUS because it was never imported into U.S.	Hawaiian Independent Refinery v. U.S. (C.D. 4777)	Honolulu Light and heavy gas oil, testing both over and under 25° A.P.I. gravity, manufactured in Foreign Trade Sub-zone 9A, Honolulu, from crude oil having status of non-privileged foreign merchandise
P79/208	Rao, J. November 20, 1979	The Specialty House, Inc.	78-9-01605	Item 372.70 25¢ per lb. + 32.5%	Item 372.10 30%	Agreed statement of facts	New York 100% acrylic shawls, scarves, etc.; lace
P79/209	Maletz, J. November 20, 1979	DYN Electronics	78-8-01505, etc.	Item 735.20 10%	Item 734.20 5.5%	APF Electronics, Inc. v. U.S. (C.D. 4784)	Los Angeles T.V. game machines

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P79/210	Richardson, J. November 21, 1979	Broadway-Hale Stores, Inc.	75-11-02881	10% additional duty for alleged failure to properly mark imports with country of origin under sec. 304, Tariff Act of 1930 (19 U.S.C. § 1304 (1970))	Merchandise not subject to additional 10% duty; properly marked in compliance with sec. 304, *supra*	Agreed statement of facts	Los Angeles Wallets
P79/211	Rao, J. November 27, 1979	Iberia Lineas de Espana	76-9-02035	Item 694.40 5%	Item 804.10 Assessment of duty limited to $19,774.94 which is the sum of drawback and T.I.B. duties	Agreed statement of facts	Boston Douglas DC-10-30 aircraft
P79/212	Watson, J. November 28, 1979	World Famous Sales Co.	76-8-01797	Item 389.60 25¢ per lb. + 15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	New York Nylon backpacking tents
P79/213	Maletz, J. November 28, 1979	Shayne Knitwear, Inc.	77-5-00856	Item 382.58 37.5¢ per lb. + 20% (blouses and pants) Item 772.30 12.5% (jackets)	Item 772.30 12.5% Dutiable as entireties on basis of export value; said value is invoice unit price	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Ladies 3-piece suits entireties

P79/214	Boe, J. November 28, 1979	New York Merchandise Co., Inc.	77-10-04007	Item 544.51 26.5%	Item 688.40 9%	The Englishtown Corporation v. U.S. (C.A.D. 1187)	San Diego Travel light make-up mirrors
P79/215	Re, C. J. November 29, 1979	Sudco International Corp.	75-11-03006	Item 705.35 15%	Item 735.05 7.5%	David E. Porter v. U.S. (C.D. 4641)	Los Angeles Motocross Gloves
P79/216	Maletz, J. November 29, 1979	Montgomery Ward & Co.	76-12-02620, etc.	Item 737.90 17.5%	Item 734.20 5.5%	Mego Corp. v. U.S. (C.A.D. 1137)	New York "Pachinko" game machines
P79/217	Re, C.J. November 30, 1979	Gelmart Industries, Inc.	78-3-00471	Item 705.35 15%	Item 734.97 Free of duty	Stonewall Trading Co. v. U.S. (C.D. 4023)	New York Ski gloves, mittens, etc.; products of eligible beneficiary country entitled to GSP treatment
P79/218	Rao, J. November 30, 1979	Bernard Chaus, Inc.	78-12-02278	Item 382.58 20%+37.5¢ per lb. Merchandise assessed with excessive duties	Item 382.58 20%+37.5¢ per lb. Merchandise incorrectly assessed with duties in that $1496.50 in excess duties was assessed through a clerical error in the rate extension	Agreed statement of facts	New York Women's wearing apparel
P79/219	Richardson J. November 30, 1979	Alitransport, Inc.	74-11-03162, etc.	Item 708.89 22.5%	Item 708.80 15%	Wild Heerbrugg Instruments, Inc. v. U.S. (C.D. 4767)	New York Microscopy phototubes

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P79/220	Richardson, J. November 30, 1979	Wild Heerbrugg Instrument, Inc.	74-11-03069, etc.	Item 708.80 22.5%	Item 708.80 15%	Wild Heerbrugg Instruments, Inc. v. U.S. (C.D. 4767)	New York Microscopy phototubes
P79/221	Maletz, J. November 30, 1979	The May Department Stores Co.	75-12-03312, etc.	Item 737.80 22%	Item 725.50 8%	Amico, Inc. v. U.S. (C.A.D. 1214)	New York Acrylic music boxes with dancers; lucite piano with dancers, etc.
P79/222	Maletz, J. November 30, 1979	Albert E. Price, Inc.	74-11-03274	Item 737.80 22%	Item 725.50 8%	Amico, Inc. v. U.S. (C.A.D. 1214)	Philadelphia Lucite bird cage music boxes, etc.
P79/223	Boe, J. December 12, 1979	Hugo Stinnes Steel & Metals Co.	74-4-01101	Item 948.00 10% supplemental duty	Exempt from supplemental duty	Hugo Stinnes Steel and Metals Co. v. U.S. (C.D. 4753, aff'd C.A.D. 1226)	Detroit Articles of steel
P79/224	Boe, J. December 12, 1979	Hugo Stinnes Steel & Metals Co.	74-4-01103	Item 948.00 10% supplemental duty	Exempt from supplemental duty	Hugo Stinnes Steel and Metals Co. v. U.S. (C.D. 4753, aff'd C.A.D. 1226)	Chicago Articles of steel
P79/225	Watson, J. Decided on remand of C.D. 4685 (C.A.D. 1206)	Mobay Chemical Corp. et al.	70/36742, etc.	Item 400.00 7¢ per lb. + 45%; 6.3¢ per lb. + 40%; 5.5¢ per lb. + 35% 4.9¢	Item 405.25 2.8¢ per lb. + 18%; 2.5¢ per lb. + 16%; 2.2¢ per lb. + 14%; 1.9¢	Agreed statement of facts	New York White or black urethane pastes, which contain no benzenoid pigments, are products formed by condensation, polymeriza-

	December 18, 1979			per lb. + 31%; 4¢ per lb. + 27%; or 3.5¢ per lb. + 22.5% (items marked "A" and "B")	per lb. + 12.5%; 1.5¢ per lb. + 10.5%; or 1.4¢ per lb. + 9% (items marked "A") Item 406.70 40%, 30%, 32%, 28%, 24% or 20% (items marked "B")		tion, or copolymerization of organic chemicals to which plasticizers, fillers, colors, or extenders have been added, and are "plastic materials" within definition of said term as provided for by headnote 3 of subpart C of part 1 of schedule 4, TSUS (items marked "A") All involved urethane pastes other than those described as "black" or "white", which are products obtained, derived, or manufactured in whole or in part from products provided for in subpart A or B of part 1 of schedule 4, TSUS, and are colors, lakes, or toners used only as coloring agents (items marked "B")
P79/226	Maletz, J. December 28, 1979	North American oreign Trading Corp.	78-4-00619, etc.	Item 735.20 10%	Item 734.20 5.5%	APF Electronics Inc. v. U.S. (C.D. 4784)	Los Angeles T.V. game machines

ABSTRACTS OF CUSTOMS COURT DECISIONS

Reappraisements

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R70/105	Watson, J. July 5, 1979	Ciba Chemical and Dye Company	R66/17020, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HEAD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/106	Watson, J. July 5, 1979	Ciba Chemical and Dye Company	R66/18849, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 33.4% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

R79/107	Watson, J. July 5, 1979	Ciba Chemical and Dye Company	R66/25737, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 23.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/108	Watson, J. July 5, 1979	Geigy Chemical Corporation	R65/18913, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 33.4% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

R79/109	Watson, J. July 5, 1979	Geigy Chemical Corporation	R65/19635, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 33.4% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.60 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

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DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HEAD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/110	Watson, J. July 5, 1979	Geigy Chemical Corporation	R65/22905, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 32.6% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1153)	New York Benzenoid dyestuffs

R79/111	Watson, J. July 5, 1979	Geigy Chemical Corporation	R66/13569, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R70/112	Watson, J. July 5, 1979	Geigy Chemical Corporation	R67/05176, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

R79/113	Watson, J. July 5, 1979	Geigy Chemical Corporation	R68/13058, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 38.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/114	Watson, J. July 5, 1979	Geigy Chemical Corporation	R70/00262, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.9% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.36 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R79/115	Newman, J. July 17, 1979	International Importers, Inc.	R65/2594, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Chicago Electron receiving tubes

R79/116	Newman, J. July 17, 1979	Samuel Shapiro & Co., Inc. Strong Importers, Inc.	240851-A	Export value	Unit price of $14.50 plus 20% of difference between said $14.50 and appraised value of $17, f.o.b., net packed	Agreed statement of facts	Baltimore Sewing machines
R79/117	Newman, J. July 18, 1979	Hayim & Co.	R60/22158, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Rugs
R79/118	Newman, J. July 18, 1979	C. Itoh & Co. (America) Inc.	R61/5883, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Silk piece goods
R79/119	Newman, J. July 18, 1979	ITT Export Corp.	R64/21794, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	New York Electron receiving tubes
R79/120	Newman, J. July 26, 1979	Kippon Kogaku (USA), Inc.	75-11-03043	Export value	Invoice unit prices, net packed	Agreed statement of facts	New York Optical microscopes and parts
R79/121	Ford, J. July 26, 1979	International Importers, Inc.	R62/14417, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Chicago Electron receiving tubes
R79/122	Ford, J. July 27, 1979	Mitsui & Co. Ltd.	R63/61, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	New York Electron receiving tubes

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/123	Ford, J. July 30, 1979	Raytheon Company	R65/19666	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	New York Electron receiving tubes
R79/124	Newman, J. July 30, 1979	Wm. E. Wright Co.	77-1-00117	Export value	Invoice unit prices	Agreed statement of facts	New York Zippers
R79/125	Boe, J. July 30, 1979	American Pecco Corporation	75-5-01354	Constructed value	Invoice unit value plus 19%	Agreed statement of facts	Tacoma Multipurpose mobile port crane and container carrier
R79/126	Ford, J. July 31, 1979	California Eastern Laboratories, Inc., et al.	R62/14996, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	San Francisco Electron receiving tubes
R79/127	Ford, J. August 2, 1979	Mitsui & Co. Ltd.	R62/11611, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	New York Electron receiving tubes
R79/128	Ford, J. August 2, 1979	Mitsui & Co. Ltd.	R65/6334, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	San Francisco Electron receiving tubes
R79/129	Ford, J. August 2, 1979	Mitsui & Co. Ltd.	R65/7221, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Chicago Electron receiving tubes
R79/130	Ford, J. August 2, 1979	Mitsui & Co. Ltd.	R65/7319, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Chicago Electron receiving tubes

R79/131	Ford, J. August 2, 1979	Mitsui & Co. Ltd.	R65/24512, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Chicago Electron receiving tubes
R79/132	Ford, J. August 2, 1979	Mitsui & Co. Ltd.	R66/2257, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Philadelphia Electron receiving tubes
R79/133	Ford, J. August 2, 1979	Oak Mfg. Co. et al.	R65/4131, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Chicago Electron receiving tubes
R79/134	Newman, J. August 2, 1979	Fleetwood Sewing Machine Co. Ltd.	R58/17966, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Sewing machine heads
R79/135	Newman, J. August 2, 1979	Haas Food Mfg.	78-9-01000	Export value	Invoice unit values	Agreed statement of facts	New York Dispensers and dispenser heads
R79/136	Newman, J. August 2, 1979	J. R. McMullen Co., Inc.	76-1-00190, etc.	Constructed value	Invoiced unit values with currency adjustments, packed, without 12% addition over these amounts	Agreed statement of facts	New York Ladies wearing apparel
R79/137	Newman, J. August 2, 1979	J. R. McMullen Co., Inc.	76-1-00193, etc.	Constructed value	Invoiced unit values with currency adjustments, packed, without 12% addition over these amounts	Agreed statement of facts	New York Ladies wearing apparel

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/138	Newman, J. August 2, 1979	J. R. McMullen Co., Inc.	76-3-00693, etc.	Constructed value	Invoiced unit values with currency adjustments, packed, without 12% addition over these amounts	Agreed statement of facts	New York Ladies wearing apparel
R79/139	Newman, J. August 2, 1979	Reid & Reid (Division of Royal Lynne Ltd.)	76-1-00202, etc.	Constructed value	Invoiced unit values with currency adjustments, packed, without 12% addition over these amounts	Agreed statement of facts	New York Ladies wearing apparel
R79/140	Newman, J. August 2, 1979	Transworld Industries, Inc.	R60/2943, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Sewing machines
R79/141	Ford, J. August 3, 1979	Mitsui & Co. Ltd.	R64/21785, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	New York Electron receiving tubes
R79/142	Ford, J. August 3, 1979	Mitsui & Co. Ltd.	R65/2475, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Chicago Electron receiving tubes
R79/143	Ford, J. August 3, 1979	Mitsui & Co. (USA), Inc.	R66/19902, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Chicago Electron receiving tubes

R79/144	Ford, J. August 7, 1979	The Magnavox Company	R65/4001, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	San Francisco Electron receiving tubes
R79/145	Ford, J. August 7, 1979	Mitsui & Co. (USA), Inc.	R62/11215, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	New York Electron receiving tubes
R79/146	Ford, J. August 7, 1979	Mitsui & Co. Ltd.	R63/466, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Chicago Electron receiving tubes
R79/147	Ford, J. August 7, 1979	Mitsui & Co. Ltd.	R64/21116, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	New York Electron receiving tubes
R79/148	Ford, J. August 7, 1979	Mitsui & Co. Ltd.	R64/21127, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	New York Electron receiving tubes
R79/149	Ford, J. August 7, 1979	Mitsui & Co. Ltd.	R65/1589, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	New York Electron receiving tubes
R79/150	Ford, J. August 7, 1979	Mitsui & Co. Ltd.	R65/2127, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Chicago Electron receiving tubes
R79/151	Ford, J. August 7, 1979	Mitsui & Co. Ltd.	R65/7075, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Chicago Electron receiving tubes

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/152	Ford, J. August 7, 1979	Mitsui & Co. Ltd.	R65/7212, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Chicago Electron receiving tubes
R79/153	Ford, J. August 7, 1979	Mitsui & Co. Ltd.	R65/21052, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Philadelphia Electron receiving tubes
R79/154	Ford, J. August 7, 1979	Mitsui & Co. Ltd.	R65/24204, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Chicago Electron receiving tubes
R79/155	Ford, J. August 7, 1979	Mitsui & Co. Ltd.	R66/3194, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Chicago Electron receiving tubes
R79/156	Ford, J. August 7, 1979	Raytheon Company	R65/6494, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Boston Electron receiving tubes
R79/157	Ford, J. August 7, 1979	Raytheon Company	R65/9263, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Chicago Electron receiving tubes
R79/158	Re, C.J. August 15, 1979	Mid-America Shipping Service	78-3-00473	Constructed value	$740.80 less prorated nondutiable charges for receiver No. 54621 and $1,111.20 less prorated nondutiable charges for receiver No. 54630, net packed	Agreed statement of facts	Chicago FM radio receivers
R79/159	Ford, J. August 15, 1979	H & H Customs Clearance Co. et al.	R64/21159, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	New York Electron receiving tubes

R79/160	Ford, J. August 15, 1979	International Expediters, Inc.	R65/23622	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Chicago Electron receiving tubes
R79/161	Ford, J. August 15, 1979	Nippon Electric New York, Inc.	R65/6389, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	San Francisco Electron receiving tubes
R79/162	Ford, J. August 15, 1979	Nissei Sangyo Co. Ltd.	R65/15910, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Boston Electron receiving tubes
R79/163	Ford, J. August 15, 1979	Nissei Sangyo Co. Ltd.	R65/23698, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Chicago Electron receiving tubes
R79/164	Watson, J. August 15, 1979	Railway Express Agency, Inc.	R66/22282, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 33.4% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/165	Watson, J. August 15, 1979	Railway Express Agency, Inc.	R66/23883, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R79/166	Watson, J. August 15, 1979	Railway Express Agency, Inc.	R67/6571, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 32.6% representing profit and general expenses usually made in U.S. on sales of dye-	U.S. v. Geigy Chemical Corporation et al.	New York Benzenoid dyestuffs

					stuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs		
R79/167	Watson, J. August 15, 1979	Railway Express Agency, Inc.	R67/7228, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/108	Watson, J. August 15, 1979	Railway Express Agency, Inc.	R68/982	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 32.6% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R79/109	Maletz, J. August 15, 1979	J. C. Penney Company, Inc., et al.	R67/13217	Export value	Appraised values, less charges listed on invoices encompased by the entry papers as "buying commissions" or "handling commissions"	Judgment on the pleadings	San Francisco; Wilmington, N.C.; Norfolk Various articles

R79/170	Newman, J. August 15, 1979	Nichimen Co., Inc.	R63/6554, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Sewing machine heads
R79/171	Watson, J. August 23, 1979	Ciba Chemical and Dye Company	R67/3313, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 32.6% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

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DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/172	Watson, J. August 23, 1979	Ciba Chemical and Dye Company	R69/11140, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 38.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R79/173	Re, C. J. August 30, 1979	Haytm & Co.	R60/3175, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Rugs

R79/174	Re, C. J. August 30, 1979	Hayim & Co.	R60/4655, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Rugs
R79/175	Re, C. J. August 30, 1979	Hayim & Co.	R61/2338, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Rugs
R79/176	Re, C. J. August 30, 1979	Hayim & Co.	R62/1225, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice price and appraised values	Agreed statement of facts	New York Rugs
R79/177	Re, C. J. August 30, 1979	Kurt Orban Co., Inc. (New Jersey High Carbon Wire Corp.)	R70/1044, etc.	Export value	Appraised values be calculated by deducting the following cost items from the C and F prices: ocean freight (free in, free out); loading charges in Japan from barge to vessel; estimated discharging costs from vessel to pier in Detroit and New Orleans; survey and tally fees; and other various charges (insurance, agency fees, etc.) except for the amount of lighterage shown on consumption entry 117508	Kurt Orban Co., Inc. v. U.S. (C.A.D. 1209)	Detroit; New Orleans Steel bars

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/178	Richardson, J. August 30, 1979	National Silver Company	73-7-01881	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New Bedford (Boston) Stainless steel flatware
R79/179	Ford, J. September 6, 1979	Raytheon Company	R64/23863, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Boston Electron receiving tubes
R79/180	Watson, J. September 6, 1979	Ciba Chemical and Dye Company	R66/19713, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 23.5% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

R79/181	Watson, J. September 11, 1979	Ciba Chemical and Dye Company	R66/15673	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 25.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/182	Watson, J. September 11, 1979	Ciba Chemical and Dye Company	R66/20780, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 24.2% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

R79/183	Watson, J. September 11, 1979	Ciba Chemical and Dye Company	R66/23305, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 24.2% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/184	Watson, J. September 11, 1979	Ciba Chemical and Dye Company	R67/12779	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

R79/185	Watson, J. September 11, 1979	Railway Express Agency	R67/6573, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 24.2% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/186	Watson, J. September 11, 1979	Railway Express Agency	R68/5923, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 38.7% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R79/187	Ford, J. September 20, 1979	Mitsui & Co. Ltd.	R63/2203	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	New York Electron receiving tubes
R79188	Ford, J. September 20, 1979	Mitsui & Co. Ltd. et al.	R64/15599, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Chicago Electron receiving tubes

R79/189	Richardson, J. September 24, 1979	Knickerbocker Toy Co., Inc.	77-5-00844, etc.	Export value	Invoiced unit values plus cost of material assists furnished by importer as reflected in entry papers	Agreed statement of facts	New York Dolls, toys, etc.
R79/190	Richardson, J. September 24, 1979	Southern Precision Instrument Company	287304-A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	San Antonio (Laredo) Binoculars
R79/191	Richardson, J. September 24, 1979	Southern Precision Instrument Company	289408-A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	San Antonio (Laredo) Binoculars and binocular cases
R79/192	Richardson, J. September 24, 1979	Southern Precision Instrument Company	R58/5267, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	San Antonio (Laredo) Binoculars
R79/193	Richardson, J. September 24, 1979	Southern Precision Instrument Company	R59/5231, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	San Antonio (Laredo) Binoculars and binocular cases
R79/194	Richardson, J. September 24, 1979	Southern Precision Instrument Company	R59/5233, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	San Antonio (Laredo) Binoculars and binocular cases

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/195	Richardson, J. September 24, 1979	Southern Precision Instrument Company	R59/8426, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	San Antonio (Laredo) Binoculars
R79/196	Richardson, J. September 24, 1979	Southern Precision Instrument Company	R59/14284, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	San Antonio (Laredo) Binoculars
R79/197	Richardson, J. September 24, 1979	Southern Precision Instrument Company	R60/8288, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	San Antonio (Laredo) Binoculars
R79/198	Richardson, J. September 24, 1979	Southern Precision Instrument Company	R61/5785, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	San Antonio (Laredo) Binoculars
R79/199	Landis, J. September 24, 1979	RCA Victor Mexicana SA et al.	R65/15638, etc.	Constructed value	As set forth on schedule C attached to decision and judgment	Brown, Alcantar & Brown, Inc., et al. v. U.S. (A.R.D. 306)	Los Angeles Phonograph records
R79/200	Newman, J. September 24, 1979	Yoshida International Inc.	72-1-00143	Constructed value	Equal to invoiced unit prices plus 8.5%, net, packed	Agreed statement of facts	New York Zippers and/or zipper parts

R79/201	Ford, J. September 27, 1979	Fuji-Land, Inc.	R65/15933, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Boston Electron receiving tubes
R79/202	Ford, J. September 27, 1979	Fuji-Land, Inc.	R65/19372, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Chicago Electron receiving tubes
R79/203	Richardson, J. September 27, 1979	Bus and Truck Supply Co.	72-11-02451, etc.	Export value	Appraised values, less 10% (excluding from 10% deduction the value of any Michelin tires included in appraised values), less value of components of U.S. origin allowed on liquidation	Agreed statement of facts	Houston Inter-city passenger buses
R79/204	Richardson, J. September 27, 1979	Bus and Truck Supply Co.	73-2-00568, etc.	Export value	Appraised values, less 10% (excluding from 10% deduction the value of any Michelin tires included in appraised values), less value of components of U.S. origin allowed on liquidation	Agreed statement of facts	New Orleans Inter-city passenger buses
R79/205	Richardson, J. September 27, 1979	Bus and Truck Supply Co.	73-3-00706, etc.	Export value	Appraised values, less 10% (excluding from 10% deduction the value of any Michelin tires included in appraised values), less value of components of U.S. origin allowed on liquidation	Agreed statement of facts	New Orleans Inter-city passenger buses

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/206	Richardson, J. September 27, 1979	Bus and Truck Supply Co.	77-7-01148	Export value	Appraised values, less 10% (excluding from 10% deduction the value of any Michelin tires included in appraised values), less value of components of U.S. origin allowed on liquidation	Agreed statement of facts	New Orleans Inter-city passenger buses
R79/207	Maletz, J. September 27, 1979	Sercel Incorporated	75-6-01533, etc.	Export value	Invoice unit values plus 50% of difference between invoice unit values and appraised values	Agreed statement of facts	Houston Seismographs and parts thereof
R79/208	Richardson, J. October 4, 1979	Southern Precision Instrument Company	R59/16583, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	San Antonio (Laredo) Binoculars
R79/209	Richardson, J. October 4, 1979	Page & Jones Inc.	77-4-00692	Constructed value	Invoiced unit values	Agreed statement of facts	Mobile Steel components for electrical transmission towers

R79/210	Richardson, J. October 4, 1979	American Express Company, a/c Bus & Truck Supply Company	R65/2514, etc.	Constructed value	$21,466.80 plus value determined on appraisement of components furnished to Bus and Car Co. without charge by Western Sales, Ltd., less amount of any damage allowed in appraisement, plus or minus any adjustments made on appraisement for components or parts added to or omitted from a particular shipment, and less the value of components of U.S. origin	Agreed statement of facts	New Orleans Inter-city passenger buses
R79/211	Richardson, J. October 10, 1979	Transworld Shipping	R65/23348, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Sewing machine heads
R79/212	Richardson, J. October 11, 1979	Brother International Corp.	R65/16180	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	Longview (Portland) Sewing machines and wooden consoles
R79/213	Richardson, J. October 11, 1979	Southern Precision Instrument Company	R58/19679, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	San Antonio (Laredo) Binoculars

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/214	Ford, J. October 19, 1979	California Eastern Laboratories, Inc.	R65/1780, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	San Francisco Electron receiving tubes
R79/215	Watson, J. October 19, 1979	Ciba Chemical and Dye Company	R65/21000, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 32.6% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

R79/216	Watson, J. October 19, 1979	Ciba Chemical and Dye Company	R66/21612	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement; divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

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DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/217	Watson, J. October 19, 1979	Railway Express Agency, Inc.	R67/9104, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by customs officer at time of appraisement; less 28.3% representing profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by customs officer at time of appraisement divided by 1.40 or such other factor applied by customs officer, to allow for customs duties payable on imported dyestuffs	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs
R79/218	Newman, J. October 23, 1979	Yoshida International	R70/1875, etc.	Constructed value	Equal to invoiced unit prices plus 8.5%, net, packed	Agreed statement of facts	New York Zippers and/or zipper parts advisorily classified under item 745.70, 745.72 or 745.74

R79/219	Newman, J. October 25, 1979	YKK Zipper Co., Inc.	72-8-00516	Constructed value	Equal to invoiced unit prices plus 8.5%, net, packed	Agreed statement of facts	Dallas (Houston) Zippers and/or zipper parts classified under item 745.70, 745.72 or 745.74
R97/220	Newman, J. October 25, 1979	YKK Zipper (USA), Inc., et al.	72-4-00762	Constructed value	Equal to invoiced unit prices plus 8.5%, net, packed	Agreed statement of facts	Dallas (Houston) Zippers and/or zipper parts classified under item 745.70, 745.72 or 745.74
R79/221	Newman, J. October 25, 1979	YKK Zipper (USA), Inc., et al.	72-4-00914	Constructed value	Equal to invoiced unit prices plus 8.5%, net, packed	Agreed statement of facts	New York Zippers and/or zipper parts classified under item 745.70, 745.72 or 745.74
R79/222	Newman, J. October 25, 1979	YKK Zipper (USA), Inc.	72-5-01164	Constructed value	Equal to invoiced unit prices plus 8.5%, net, packed	Agreed statement of facts	New York Zippers and/or zipper parts classified under item 745.70, 745.72 or 745.74
R79/223	Newman, J. October 25, 1979	YKK Zipper, Inc.	72-8-01821	Constructed value	Equal to invoiced unit prices plus 8.5%, net, packed	Agreed statement of facts	Chicago Zippers and/or zipper parts classified under item 745.70, 745.72 or 745.74
R79/224	Newman, J. October 25, 1979	YKK Zipper, et al.	72-9-01959, etc.	Constructed value (if exported from Japan prior to 2/1/72) United States value (if exported on or after 2/1/72)	Equal to invoiced unit prices plus 8.5%, net, packed Equal to invoiced unit prices, net, packed	Agreed statement of facts	Chicago Zippers and/or zipper parts classified under item 745.70, 745.72 or 745.74

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/225	Newman, J. October 25, 1979	YKK Zipper (Calif), Inc., et al.	73-7-01774, etc.	Constructed value (if exported from Japan prior to 2/1/72) United States value (if exported on or after 2/1/72)	Equal to invoiced unit prices plus 8.5%, net, packed Equal to invoiced unit prices, net, packed	Agreed statement of facts	Los Angeles Zippers and/or zipper parts classified under item 745.70, 745.72 or 745.74
R79/226	Watson, J. October 31, 1979	Sumitomo Shoji America, Inc.	77-2-00219	United States value	Net resale price in U.S., less deductions included in appraisement, with additional deduction of 5% for overhead and profit	Agreed statement of facts	New York "Sumithion 8E"
R79/227	Rao, J. November 14, 1979	Bus and Truck Supply Co.	76-9-01985	Export value	Appraised values, less 10% (excluding from 10% deduction the value of any Michelin tires included in appraised values), less value of components of U.S. origin allowed on liquidation	Agreed statement of facts	Houston Inter-city passenger buses
R79/228	Rao, J. November 14, 1979	Yoshida International, Inc.	73-7-01864	Constructed value	Equal to invoiced unit prices plus 8.5%, net, packed	Agreed statement of facts	Los Angeles; New York Zippers and/or zipper parts classified under item 745.70, 745.72 or 745.74

R79/229	Ford, J. November 14, 1979	International Standard Electric Corp.	R68/3703, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	New York Electron receiving tubes
R79/230	Ford, J. November 14, 1979	Westinghouse Electric Corp.	R67/14454	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	New York Electron receiving tubes
R79/231	Watson, J. November 14, 1979	YKK Zipper Inc.	72-8-01876	Constructed value	Equal to invoiced unit prices plus 8.5%, net, packed	Agreed statement of facts	Chicago; Los Angeles Zippers and/or zipper parts classified under item 745.70, 745.72 or 745.74
R79/232	Newman, J. November 14, 1979	YKK Zipper (USA), Inc., etc.	72-11-02291	Constructed value (if exported from Japan prior to 2/1/72) United States value (if exported on or after 2/1/72)	Equal to invoiced unit prices plus 8.5%, net, packed Equal to invoiced unit prices, net, packed	Agreed statement of facts	Dallas (Houston); Houston; Los Angeles Zippers and/or zipper parts classified under item 745.70, 745.72 or 745.74
R79/233	Newman, J. November 14, 1979	YKK Zipper (Illinois), Inc.	72-12-02610	Constructed value	Equal to invoiced unit prices plus 8.5%, net, packed	Agreed statement of facts	Chicago; New York Zippers and/or zipper parts classified under item 745.70, 745.72 or 745.74
R79/234	Newman, J. November 14, 1979	YKK Zipper (Calif.), Inc.	72-12-02617	Constructed value (if exported from Japan prior to 2/1/72) United States value (if exported on or after 2/1/72)	Equal to invoiced unit prices plus 8.5%, net, packed Equal to invoiced unit prices, net, packed	Agreed statement of facts	Los Angeles; Seattle Zippers and/or zipper parts classified under item 745.70, 745.72 or 745.74

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/235	Rao, J. November 15, 1979	Bus and Truck Supply Co.	76-9-02143, etc.	Export value	Appraised values less 10% (excluding from 10% deduction the value of any Michelin tires included in appraised values), less value of components of U.S. origin allowed on liquidation	Agreed statement of facts	New Orleans Inter-city passenger buses
R79/236	Rao, J. November 19, 1979	American Express Company, a/c Bus & Truck Supply Company	R66/2259, etc.	Constructed value	$21,466.80 plus value determined on appraisement of components furnished to Bus and Car Co. without charge by Western Sales, Ltd., less amount of any damage allowed in appraisement, plus or minus any adjustments made on appraisement for components or parts added to or omitted from a particular shipment, and less value of components of U.S. origin	Agreed statement of facts	New Orleans Inter-city passenger buses

R79/237	Rao, J. November 19, 1979	American Express Company, a/c Bus & Truck Supply Company	R66/2265, etc.	Constructed value	$21,466.80 plus value determined on appraisement of components furnished to Bus and Car Co. without charge by Western Sales, Ltd., less amount of any damage allowed in appraisement, plus or minus any adjustments made on appraisement for components or parts added to or omitted from a particular shipment, and less value of components of U.S. origin	Agreed statement of facts	New Orleans Inter-city passenger buses
R79/238	Rao, J. November 19, 1979	American Express Company, a/c Bus & Truck Supply Company	R66/2260, etc.	Constructed value	$21,466.80 plus value determined on appraisement of components furnished to Bus and Car Co. without charge by Western Sales, Ltd., less amount of any damage allowed in appraisement, plus or minus any adjustments made on appraisement for components or parts added to or omitted from a particular shipment, and less value of components of U.S. origin	Agreed statement of facts	New Orleans Inter-city passenger buses

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/239	Rao, J. November 20, 1979	Bus and Truck Supply Co.	76-1-00091, etc.	Export value	Appraised values, less 10% (excluding from 10% deduction the value of any Michelin tires included in appraised values), less value of components of U.S. origin allowed on liquidation	Agreed statement of facts	New Orleans Inter-city passenger buses
R79/240	Rao, J. November 20, 1979	Robert M. McCoy, a/c Bus and Truck Supply Co.	75-10-02573	Export value	Appraised values, less 10% (excluding from 10% deduction the value of any Michelin tires included in appraised values), less value of components of U.S. origin allowed on liquidation	Agreed statement of facts	Jacksonville (Tampa) Inter-city passenger buses
R79/241	Rao, J. November 20, 1979	YKK Zipper et al.	74-7-01746, etc.	Constructed value (if exported from Japan prior to 2/1/72) United States value (if exported on or after 2/1/72)	Equal to invoiced unit prices plus 8.5%, net, packed Equal to invoiced unit prices, net, packed	Agreed statement of facts	Los Angeles Zippers and/or zipper parts, classified under item 745.70, 745.72 or 745.74
R79/242	Newman, J. November 20, 1979	Yoshida International Inc. et al.	73-5-01140, etc.	Constructed value (if exported from Japan prior to 2/1/72) United States value (if exported on or after 2/1/72)	Equal to invoiced unit prices plus 8.5%, net, packed Equal to invoiced unit prices, net, packed	Agreed statement of facts	New York; Chicago; Los Angeles Zippers and/or zipper parts, classified under item 745.70, 745.72 or 745.74

R79/243	Rao, J. November 21, 1979	Bus and Truck Supply Co.	73-1-00077	Export value	Appraised values, less 10% (excluding from 10% deduction the value of any Michelin tires included in appraised values), less value of components of U.S. origin allowed on liquidation	Agreed statement of facts	Houston Inter-city passenger buses
R79/244	Rao, J. November 21, 1979	Bus and Truck Supply Co	75-3-00712, etc.	Export value	Appraised values, less 10% (excluding from 10% deduction the value of any Michelin tires included in appraised values), less value of components of U.S. origin allowed on liquidation	Agreed statement of facts	New Orleans Inter-city passenger buses
R79/245	Rao, J. November 21, 1979	YKK Zipper, Inc.	73-4-00890	Constructed value	Equal to invoiced unit prices plus 8.5%, net, packed	Agreed statement of facts	Chicago; Los Angeles Zippers and/or zipper parts, classified under item 745.70, 745.72 or 745.74
R79/246	Newman, J. November 21, 1979	YKK Zipper, Inc.	73-4-00919	Constructed value (if exported from Japan prior to 2/1/72) United States value (if exported on or after 2/1/72)	Equal to invoiced unit prices plus 8.5%, net, packed Equal to invoiced unit prices, net, packed	Agreed statement of facts	Chicago; Los Angeles Zipper and/or zipper parts, classified under item 745.70, 745.72 or 745.74

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/247	Watson, J. November 27, 1979	YKK Zipper Co., Inc., Yoshida Int'l. Inc.	72-11-02395	Constructed value	Equal to invoiced unit prices plus 8.5%, net, packed	Agreed statement of facts	Los Angeles; Dallas Zippers and/or zipper parts, classified under item 745.70, 745.72 or 745.74
R79/248	Rao, J. November 28, 1979	Yoshida Int'l. Inc., et al.	73-1-00334, etc.	Constructed value	Equal to invoiced unit prices plus 8.5%, net, packed	Agreed statement of facts	New York; Los Angeles Zippers and/or zipper parts, classified under item 745.70, 745.72 or 745.74
R79/249	Watson, J. November 28, 1979	YKK Zipper (Calif.), Inc., et al.	72-12-02615, etc.	Constructed value	Equal to invoiced unit prices plus 8.5%, net, packed	Agreed statement of facts	Los Angeles Zippers and/or zipper parts classified under item 745.70, 745.72 or 745.74
R79/250	Watson, J. November 28, 1979	Yoshida International, Inc.	72-9-01965	Constructed value	Equal to invoiced unit prices plus 8.5%, net, packed	Agreed statement of facts	New York; Los Angeles; Dallas Zippers and/or zipper parts, classified under item 745.70, 745.72 or 745.74
R79/251	Ford, J. December 4, 1979	Control Data Corp.	R67/4673, etc.	Constructed value	Per unit values as set forth in schedule attached to decision and judgment	Control Data Corporation v. U.S. (C.A.D. 1132)	Minneapolis Inner memory, outer memory, memory, and extended core storage plane assemblies; toroidal coils

R79/252	Landis, J. December 4, 1979	Mitsubishi International Corp.	R68/8242	Constructed value	Total purchase price ($70,256) less ocean freight ($7,741) plus assists ($6,464)	Agreed statement of facts	Cleveland Mechanical equipment (punch presses)
R79/253	Landis, J. December 4, 1979	Mitsubishi International Corp.	R68/8243	Constructed value	Total purchase price ($87,820) less ocean freight ($9,565) plus assists ($8,022)	Agreed statement of facts	Cleveland Mechanical equipment (punch presses)
R79/254	Landis, J. December 4, 1979	Mitsubishi International Corp.	R68/8246	Constructed value	Total purchase price ($52,692) less ocean freight ($5,765) plus assists ($4,856)	Agreed statement of facts	Cleveland Mechanical equipment (punch presses)
R79/255	Landis, J. December 4, 1979	Seaway Forwarding Co.	R68/8241	Constructed value	Total purchase price ($109,200) less ocean freight ($11,552) plus assists ($9,690)	Agreed statement of facts	Cleveland Mechanical equipment (punch presses)
R79/256	Landis, J. December 4, 1979	Seaway Forwarding Co.	R68/8244	Constructed value	Total purchase price ($300,000) less ocean freight ($33,033) plus assists ($20,496)	Agreed statement of facts	Cleveland Mechanical equipment (punch presses)
R79/257	Landis, J. December 4, 1979	Seaway Forwarding Co.	R68/8245	Constructed value	Total purchase price ($109,200) less ocean freight ($12,374) plus assists ($9,690)	Agreed statement of facts	Cleveland Mechanical equipment (punch presses)
R79/258	Re, C.J. December 12, 1979	P	78-7-01292	Export value	Invoice unit values	Agreed statement of facts	New York Polyester knit fabrics

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/259	Re, C. J. December 12, 1979	YKK Zipper YKK Zipper (USA), Inc.	74-10-02741	Constructed value	Equal to invoiced unit prices plus 8.5%, net, packed	Agreed statement of facts	San Francisco-Oakland (San Francisco) Zippers and/or zipper parts, classified under item 745.70, 745.72 or 745.74
R79/260	Re, C. J. December 12, 1979	YKK Zipper Co. et al.	73-9-02661, etc.	Constructed value	Equal to invoiced unit prices plus 8.5%, net, packed	Agreed statement of facts	Los Angeles Zippers and/or zipper parts, classified under item 745.70, 745.72 or 745.74
R79/261	Re, C. J. December 12, 1979	YKK Zipper, Inc.	72-8-01841	Constructed value	Equal to invoiced unit prices plus 8.5%, net, packed	Agreed statement of facts	Chicago Zippers and/or zipper parts, classified under item 745.70, 745.72 or 745.74
R79/262	Re, C. J. December 12, 1979	YKK Zipper (Ill), Inc.	72-8-01877	Constructed value	Equal to invoiced unit prices plus 8.5%, net, packed	Agreed statement of facts	Chicago Zippers and/or zipper parts, classified under item 745.70, 745.72 or 745.74
R79/263	Re, C. J. December 12, 1979	YKK Zipper (Mo), Inc. YKK Zipper Co.	75-1-00194, etc.	Constructed value (if exported from Japan prior to 2/1/72) United States value (if exported on or after 2/1/72)	Equal to invoiced unit prices plus 8.5%, net, packed Equal to invoiced unit prices, net, packed	Agreed statement of facts	Chicago Zippers and/or zipper parts, classified under item 745.70, 745.72 or 745.74

R79/264	Re, C. J. December 18, 1979	Belcrest Linens, Inc.	76-11-02432, etc.	Constructed value	Invoice unit values plus an additional 5% of costs for materials and for shipping materials from place of manufacture of materials to place of manufacture of finished imported product (Hong Kong)	Agreed statement of facts	New York Dry goods
R79/265	Newman, J. December 18, 1979	Yoshida International, Inc. YKK Zipper (USA), Inc., et al.	73-8-02132, etc.	Constructed value (if exported from Japan prior to 2/1/72) United States value (if exported on or after 2/1/72)	Equal to invoiced unit prices plus 8.5%, net, packed Equal to invoiced unit prices, net, packed	Agreed statement of facts	New York Zippers and/or zipper parts, classified under item 745.70, 745.72 or 745.74
R79/266	Re, C. J. December 28, 1979	Bus and Truck Supply Co.	73-2-00970, etc.	Export value	Appraised values, less 10% (excluding from 10% deduction the value of any Michelin tires included in appraised values), less value of components of U.S. origin allowed on liquidation	Agreed statement of facts	New Orleans Inter-city passenger buses

ABSTRACTS OF CUSTOMS COURT DECISIONS

Valuation Decisions on Remand from Protest Proceedings

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	PROTEST NO.	BASIS OF VALUATION	UNIT OF VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V79/1	Ford, J. September 11, 1979	Mitsui & Co., Ltd.	65/7458 (C.D. 3330)	Foreign value	Represented by the values in Japanese currency noted in red ink by the customs examiner, plus 200 yen per cubic foot export packing, except that the export value of tu e 6X8 amounts to $0.4132 each, net packed	Daystrom, Inc., et al. v. U.S. (C.A.D. 920)	New York Electron receiving tubes

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RULES OF THE UNITED STATES CUSTOMS COURT

STATEMENT OF THE COURT IN ADOPTING AMENDMENTS AND ADDITIONS TO THE RULES

That the following amendments and additions to the Rules of the United States Customs Court shall take effect on January 1, 1980, and shall govern all proceedings in actions brought thereafter. They shall also govern all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action then pending would not be feasible or would work injustice, in which event the former procedure applies.

In addition, whenever a party is required or has been requested prior to the effective date of the following amendments and additions to perform an act, pursuant to the rules of this court in effect prior to January 1, 1980, the act may still be performed in accordance with the rules in effect prior to January 1, 1980.

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RULES OF THE UNITED STATES CUSTOMS COURT

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Chapter 2. The Court

RULE 2.1 THE COURT NAME, SEAL, TERM; EMERGENCY MATTERS

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(c) **Court Term:** The court shall be in continuous session for transacting judicial business on all business days throughout the year.

(d) **Emergency Matters:** Emergency matters may be presented to and heard by the court at any time.

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RULE 2.3 ASSIGNMENT OF ACTIONS

(a) **Assignment:** Actions Shall Be Assigned by the Chief Judge as Follows:

(1) Upon notice of trial or dispositive motion in an action commenced under 28 U.S.C. § 1582 (a) and (b) (except actions commenced pursuant to section 516A of the Tariff Act of 1930);

(2) Upon joinder of issue or dispositive motion in all other actions; or

(3) At any time, in any action, upon motion of a party for good cause shown, or upon his own initiative.

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Chapter 3. Commencement of Action; Summons; Summons and Complaint; Computation of Time

RULE 3.1 FORMS OF ACTION

(a) **Civil Action:** An action which is commenced in the United States Customs Court shall be known as a civil action except for those actions covered by paragraph (b) of this rule.

(b) **Designation of Certain Pre-October 1, 1970 Actions:** The following designations shall apply to actions arising prior to October 1, 1970:

(1) **Appeal for Reappraisement:** An action arising pursuant to section 501 or 516(a) of the Tariff Act of 1930, as effective prior to October 1, 1970, and forwarded to the court pursuant to section 501 or 516(c) of said Act, shall be known as an appeal for reappraisement.

(2) **Protest:** An action arising pursuant to section 514 or 516(b) of the Tariff Act of 1930, as effective prior to October 1, 1970, and forwarded to the court pursuant to section 515 or 516(c) of said Act, shall be known as a protest.

[Rule 3.1(c) deleted; content incorporated above.]

RULE 3.2 COMMENCEMENT OF ACTION

(a) **Summons; Summons and Complaint: Filing; Fee:** A civil action is commenced in the United States Customs Court as follows:

(1) In an action under 28 U.S.C. § 1582 (a) and (b) (except actions commenced pursuant to section 516A of the Tariff Act of 1930), upon the filing of a summons in the form described in Appendix A or Appendix B–1.

(2) In an action under section 516A(a)(2) of the Tariff Act of 1930, upon the filing of a summons in the form described in Appendix B–2.

(3) In all other actions, by filing concurrently a summons in the form described in Appendix B–2 and a complaint.

In all actions, a filing fee of $5 shall be paid in the manner prescribed by the clerk. In addition, a completed Information Statement, on a form to be furnished by the clerk, shall be filed.

(b) **Summons; Summons and Complaint: Filing by Mail; Date of Filing:** For purposes of commencement of an action, a summons, or summons and complaint, sent by registered or certified mail properly addressed to the clerk of the court at One Federal Plaza, New York, New York 10007, with the proper postage affixed and return receipt requested, shall be deemed filed as of the date of postmark.

(c) **Summons; Summons and Complaint: By Whom Filed:** In an action commenced by an individual on his own behalf, a summons, or summons and complaint, may be filed by such individual, or by an attorney admitted to practice before this court. In any other action, a summons, or summons and complaint, may be filed only by an attorney admitted to practice before this court.

(d) **Summons; Summons and Complaint: Number of Copies:**

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(3) An original and 3 copies of the summons, or summons and complaint when filed concurrently, shall be filed with the clerk in all other actions: *Provided,* That when the action involves more than one defendant, an additional copy of the summons shall be filed for each additional defendant, and, when the action is commenced by the filing of a summons and complaint concurrently, an additional copy of the complaint shall also be filed for each additional defendant, except when the plaintiff serves the complaint pursuant to Rule 3.2(g)(4).

(e) **Summons; Summons and Complaint: Date of Filing; Motion To Correct:**

(1) The records of the clerk, including the date of filing stamped on the summons, or summons and complaint, or when sent by registered or certified mail, the date of postmark, shall be final and conclusive evidence of the date on which a summons, or summons and complaint, was filed unless a motion to correct the record is made and granted pursuant to subparagraph (2) of this paragraph (e).

(2) A party who contends that the effective filing date of a summons, or summons and complaint, should be a date other than the date shown in the records of the clerk may seek a corrective order by motion made pursuant to Rule 4.12, and the court may, upon satisfactory proof that the records of the clerk with respect to the filing date were incorrect, order the record corrected.

(f) **Amendment:** At any time in its discretion, and upon such terms as it deems just, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the amendment is allowed, the court may: (1) allow any summons, or proof of service thereof, to be amended, or (2) allow amendment of proof of service of the complaint.

(g) **Summons; Summons Filed Concurrently With Complaint:** Service by Clerk or Plaintiff: Upon filing of a summons, or a summons filed concurrently with a complaint, the summons shall be issued in the name of the clerk under the seal of the court. The clerk shall return a copy of the summons, together with a receipt for payment of the filing fee, to the person who filed the summons, or summons and complaint, and shall make service of the summons, or summons and complaint, as prescribed by this rule:

(1) When a civil action is commenced under 28 U.S.C. § 1582 (a) and (b) (except an action commenced pursuant to section 516A of the Tariff Act of 1930), the clerk shall make service of the summons: upon the Attorney General, by delivery or by mailing a copy to the Attorney in Charge, Field Office for Customs Litigation, Department of Justice; and upon the Secretary of the Treasury, by delivery or by mailing a copy to the Assistant Chief Counsel for Customs Litigation, United States Customs Service, and by delivery or by mailing a copy to the district director for the customs district in which the protest was denied, or, in which the liquidation of an entry is contested under section 516(c) of the Tariff Act of 1930.

(2) When a civil action is commenced to contest a decision of the Secretary of the Treasury under section 516(c) of the Tariff Act of 1930, the clerk shall make service by delivery or by mailing a copy of the summons to the parties specified in subparagraph (1) of this paragraph (g) and to the consignee or agent of the consignee involved in each entry which is the subject of the civil action.

(3) When a civil action is commenced under 28 U.S.C. § 1582 (e) and (f), or under section 516A of the Tariff Act of 1930, the clerk shall make service of the summons, or summons and complaint when filed concurrently, upon the Attorney General as provided in subparagraph (1) of this paragraph (g) and upon the heads of the government agencies whose determinations are the subject of the action.

When the head of an agency or a named official is to be served, service shall be made by the clerk by mailing a copy of the summons,

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or summons and complaint when filed concurrently, by registered or certified mail to the agency or official.

(4) Service of Summons and Complaint by Plaintiff in Section 516A(a)(1) Action: Instead of service of the summons and complaint by the clerk, in an action commenced pursuant to section 516A(a)(1) of the Tariff Act of 1930, plaintiff may obtain a court number from the clerk and serve a copy of the summons and complaint in accordance with subparagraph (3) of this paragraph (g). Plaintiff shall forthwith file the original summons and complaint, together with an affidavit of service, with the clerk of the court.

[Rules 3.2 (h) and (i) deleted; see new CHAPTER 5. DOCUMENTS.]

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RULE 3.5 SUMMONS BY DOMESTIC INTERESTED PARTIES: FORM AND CONTENT

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[No language change in Rules 3.5 (a), (b), and (c). Rules 3.5 (d) and (e) deleted; content incorporated in Rule 3.6 below.]

[RULE 3.6 TIME—redesignated as RULE 3.7.]

RULE 3.6 SUMMONS IN ALL OTHER ACTIONS: FORM AND CONTENT

Form and Content of Summons in All Other Civil Actions: A summons in all other civil actions shall be substantially in the form as set forth in Appendix B–2, and shall set forth:

(1) The name and standing of the plaintiff;

(2) A brief description of the contested determination;

(3) The date of such determination;

(4) If applicable, the date of publication in the Federal Register of notice of the contested determination; and

(5) The name, signature, post office address and telephone number of the attorney filing the summons or of the individual filing the summons in his own behalf.

RULE 3.7 TIME

[Only change is redesignation from Rule 3.6 to Rule 3.7; language remains identical.]

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Chapter 4. Pleadings; Motions

RULE 4.1 SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(a) **Service:** * * *

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(4) Upon the United States, by delivery or by mailing a copy to the office of the Assistant Attorney General of the United States, Attorney in Charge, Field Office for Customs Litigation, 26 Federal Plaza, New York, New York 10007.

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RULE 4.4 PLEADINGS

(a) **Filing of Complaint and Answer in a Civil Action Commenced Under 28 U.S.C. § 1582 (a) and (b) (Except Actions Commenced Under Section 516A of the Tariff Act of 1930):** A plaintiff who desires to try or otherwise prosecute an action commenced under 28 U.S.C. § 1582 (a) and (b) (except actions commenced under section 516A of the Tariff Act of 1930) shall serve upon the opposite party and file with the court a complaint to which an answer shall be filed.

(b) **Demand for a Complaint in a Civil Action Commenced Under 28 U.S.C. § 1582 (a) and (b) (Except Actions Commenced Under Section 516A of the Tariff Act of 1930):** A defendant who desires to have an action tried or otherwise prosecuted shall serve upon the opposite party and file with the court a demand for a complaint. Upon the service and filing of such demand, the plaintiff, in the absence of other disposition, shall serve upon the opposite party and file with the court a complaint within 30 days from the filing of such demand.

(c) **Filing of a Complaint in a Civil Action Commenced Under Section 516A(a)(1) of the Tariff Act of 1930:** In an action commenced under section 516A(a)(1) of the Tariff Act of 1930, a complaint shall be filed with the court concurrently with the summons.

(d) **Filing of a Complaint in a Civil Action Commenced Under Section 516A(a)(2) of the Tariff Act of 1930:** In an action commenced under section 516A(a)(2) of the Tariff Act of 1930, a complaint shall be filed with the court within 30 days after the filing of the summons.

(e) **Replies to Answers:** There shall be a reply to an alternative claim or an affirmative defense denominated as such contained in an answer. No other pleading shall be allowed except that the court may order a reply to an answer.

RULE 4.5 CONTENT OF COMPLAINT IN A CIVIL ACTION COMMENCED PURSUANT TO 28 U.S.C. § 1582 (a) AND (b) (EXCEPT ACTIONS COMMENCED PURSUANT TO SECTION 516A OF THE TARIFF ACT OF 1930)

(a) **General:** The complaint in a civil action shall set forth:

(1) A statement of the plaintiff's standing in the action;

(2) A statement that the protest was timely filed, and in the case of a protest filed by a surety, a statement that the protest certified that it was not filed collusively to extend another authorized person's time to protest;

(3) A statement, when appropriate, that all liquidated duties have been paid;

(4) A description of the merchandise involved;

(5) A specification of the contested customs decision or decisions; and

(6) A demand for judgment for the relief to which plaintiff deems himself entitled.

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RULE 4.5C CONTENT OF COMPLAINT IN A CIVIL ACTION COMMENCED PURSUANT TO SECTION 516A OF THE TARIFF ACT OF 1930

Complaint: Form and Content: A complaint in a civil action commenced pursuant to section 516A of the Tariff Act of 1930 shall set forth:

(1) A short and plain statement of the grounds upon which the court's jurisdiction depends;

(2) A short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) A demand for judgment for the relief to which the pleader deems itself entitled. Relief in the alternative or of several different types may be demanded.

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RULE 4.7 DEFENSES AND OBJECTIONS: WHEN AND HOW PRESENTED

(a) **Time for Answer and Reply:**

(1) In a civil action contesting a determination listed in section 516A(a)(1) of the Tariff Act of 1930, or a final determination under section 305(b)(1) of the Trade Agreements Act of 1979, the defendant shall file its answer within 30 days after the service of the complaint.

(2) In a civil action seeking an order making confidential information available pursuant to section 777(c)(2) of the Tariff Act of 1930, the defendant shall file its answer within 5 days of service of the summons and complaint.

(3) In all other civil actions, except as otherwise provided in these rules, a defendant shall serve its answer within 60 days after the service of the complaint.

(4) When a reply to an answer is required or ordered, the reply shall be filed within the following period: (i) within 10 days in response to answers referred to in subparagraph (a)(1) above, (ii) within 3 days in response to answers referred to in subparagraph (a)(2) above, (iii) within 30 days in response to answers referred to in subparagraph (a)(3) above.

(5) If the court denies a motion permitted under this rule or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after service by the clerk of the order of the court unless a different time is fixed by order of the court. *Provided*, however, That with respect to an action pursuant to section 777(c)(2) of the Tariff Act of 1930, the responsive pleading shall be served within 1 day after service by the clerk of the order of the court unless a different time is fixed by order of the court.

(6) If the court grants a motion for a more definite statement pursuant to paragraph (d) of this rule, the responsive pleading shall be served within 10 days after the service of the more definite statement unless a different time is fixed by order of the court. *Provided*, however,

That with respect to an action pursuant to section 777(c)(2) of the Tariff Act of 1930, the responsive pleading shall be served within 3 days after the service of the more definite statement unless a different time is fixed by order of the court.

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RULE 4.11 SIGNING OF PAPERS

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(b) **The United States:** Every pleading or other paper of the United States shall be signed by an attorney authorized to do so in the Civil Division, on behalf of the Assistant Attorney General, Civil Division, Department of Justice.

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RULE 4.12 MOTION PRACTICE

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(c) **Time To Respond:**

(1) An objection or response to a contested motion, other than one described in subparagraph (2) of this paragraph (c), shall be filed within 10 days after service of such motion, except that an objection or response to a dispositive motion, i.e., a motion to dismiss the action, a motion for judgment on the pleadings, and a motion for summary judgment, shall be filed within 30 days after service of such motion. On a dispositive motion, the moving party shall have 15 days from the date of service of the objections or response to file a reply.

(2) An objection or response to a contested motion for an order making confidential information available pursuant to section 777 (c)(2) of the Tariff Act of 1930 shall be filed within 5 days after service of such motion.

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(e) **Order To Show Cause:** An order to show cause why the requested relief should not be allowed may be granted only upon a clear and specific showing, by affidavit, of good and sufficient reasons why procedure other than by regular motion is necessary or why the time to respond should be shortened.

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[CHAPTER 5. PARTIES—removed to new CHAPTER 18.]

Chapter 5. Documents

RULE 5.1 DOCUMENTS FURNISHED IN CIVIL ACTION

Documents Furnished in a Civil Action Commenced Under 28 U.S.C. § 1582 (a) and (b) (Except Actions Commenced Pursuant to Section 516A of the Tariff Act of 1930): Upon service of the summons on the appropriate district director, he shall, in accordance with 28

U.S.C. § 2632(f), forthwith transmit the following items, if they exist, to the court as part of the official record of the civil action:

(1) Consumption or other entry;
(2) Commercial invoice;
(3) Special customs invoice;
(4) Copy of protest;
(5) Copy of denial of protest in whole or in part;
(6) Importer's exhibits;
(7) Official samples;
(8) Any official laboratory reports; and
(9) The summary sheet.

If any of the aforesaid items do not exist in the particular action, an affirmative statement to that effect shall be transmitted as part of the official record.

RULE 5.2 DOCUMENTS FURNISHED AND FILING PROCEDURE IN CIVIL ACTIONS COMMENCED PURSUANT TO SECTIONS 516A AND 777(e)(2) OF THE TARIFF ACT OF 1930

(1) **Documents Furnished and Filing Procedure in an Action Under Section 516A of the Tariff Act of 1930:** In an action commenced under section 516A of the Tariff Act of 1930, within 40 days after the service of the summons upon the head of the agency whose determination or action is the subject of the civil action, he, or his designee, shall file the items contained in subparagraphs (1)(a) and (1)(b) below (unless the alternative Rule 5.2(2) is followed), if they exist, and the items contained in subparagraph (1)(c) below, with the clerk of the court as part of the official record of the civil action:

(a) A copy of all information presented to or obtained by the Secretary of the Treasury, the administering authority, the International Trade Commission or any other agency involved, during the course of the administrative proceedings, including all governmental memoranda pertinent to the case and the record of *ex parte* meetings required to be kept by section 777(a)(3)of the Tariff Act of 1930;

(b) A copy of the determination, all transcripts of records of conferences or hearings, and all notices published in the Federal Register; and

(c) A certified list of all items described in subparagraphs (1)(a) and (1)(b) above.

Any information deemed by the agency to be confidential or privileged shall be filed under seal with the clerk of the court.

(2) **Alternative to Rule 5.2(1):** Documents Furnished and Filing Procedure in an Action Under Section 516A of the Tariff Act of 1930: In an action commenced under section 516A of the Tariff Act of 1930:

(A) (i) Within 10 days after service of the summons upon the head of the agency whose determination or action is the subject of the civil

action, the agency may elect to file with the clerk of the court a certified list of all items described in subparagraphs (1) (a) and (1) (b) of this rule and shall forthwith serve such certified list upon the plaintiff; (ii) within 10 days after the filing of the certified list, the plaintiff shall either stipulate with the agency that the filing of the certified list alone shall constitute the record or shall designate those items contained in the certified list which it wishes to be filed with the clerk of the court. If the parties stipulate that the certified list alone shall constitute the record, the plaintiff shall forthwith file a copy of such agreement with the clerk of the court. If the plaintiff designates those items contained in the certified list which it wishes to be filed with the clerk of the court, the plaintiff shall serve such designation upon the head of the agency within 10 days after the filing of the certified list; (iii) within 10 days after the service of plaintiff's designation, the agency shall file the designated matters, as well as any other items from the certified list which the agency deems relevant, with the clerk of the court.

(B) The agency shall retain the remainder of the record. All parts of the record retained by the agency or commission shall be a part of the record on review for all purposes.

(C) Upon request to the agency or commission by a party, or by the court at any time, any part of the record retained by the agency shall be filed by the agency with the clerk of the court forthwith notwithstanding any prior stipulation or designations under subparagraph (2)(A).

(3) Documents Furnished and Filing Procedure in an Action Commenced Pursuant to Section 777(c)(2) of the Tariff Act of 1930: In an action commenced pursuant to section 777(c)(2) of the Tariff Act of 1930, within 5 days after the service of the summons and complaint upon the head of the agency whose action is the subject of the civil action, he, or his designee, shall file, under seal, the information deemed confidential by the agency, together with pertinent parts of the record, with the clerk of the court, as part of the official court record of the civil action.

(4) Documents Furnished: Copies: Certified copies of the original papers in the agency proceeding may be filed.

(5) Filing of the Record With the Clerk of the Court: What Constitutes: The filing of the record shall be in accordance with paragraph (1) above, unless the parties follow the alternative procedure for filing documents set out in paragraph (2) above. In the latter event, if the parties have designated only parts of the record for filing, or if the parties stipulate to the filing of only a certified list, the filing of the designated parts of the record or certified list shall constitute filing of the record.

(6) Documents Furnished: Time; Notice of Filing: Upon motion of a party for good cause shown, or upon its own motion, the court may shorten or extend the times for filing prescribed in paragraphs (1), (2), and (3) above.

The clerk shall give notice to all parties of the date on which the record is filed.

Chapter 6. Discovery

RULE 6.1 GENERAL PROVISIONS GOVERNING DISCOVERY

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(b) **Scope of Discovery:** Unless otherwise ordered by the court in accordance with these rules, the scope of discovery is as follows:

* * * * * * *

(2) Subject to the provisions of subparagraph (3) of this paragraph (b), a party may obtain discovery of documents and tangible things otherwise discoverable under subparagraph (1) of this paragraph (b) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. The provisions of Rule 6.5(a)(3) apply to the award of costs incurred in relation to the motion. If the request is refused, the person may move for a court order. For purposes of this paragraph, a statement previously made is (i) a written statement signed or otherwise adopted or approved by the person making it, or (ii) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(3) Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subparagraph (1) of this paragraph (b) and acquired or developed in anticipation of litigation for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subparagraph (3)(C) of this paragraph (b) concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivision (3)(A)(ii) and subparagraph (3)(B) of this paragraph (b), and (ii) with respect to discovery obtained under subdivision (3)(A)(ii) of this paragraph (b) the court may require, and with respect to discovery obtained under subparagraph (3)(B) of this paragraph (b) the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(c) **Protective Orders:** * * *

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[No language change other than addition of following new paragraph.]

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 6.5(a)(3) apply to the award of costs incurred in relation to the motion.

(d) **Sequence and Timing of Discovery:** Unless the court, upon motion, for the convenience of parties and witnesses and in the interest of justice, orders otherwise, methods of discovery may be used in any sequence; and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery: *Provided*, That no discovery may be initiated prior to the filing of a complaint, or later than 90 days after issue is joined, without leave of court.

(e) **Supplementation of Responses:** A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (i) the identity and location of persons having knowledge of discoverable matters, and (ii) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (i) he knows that the response was incorrect when made, or (ii) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(f) **Discovery Conference:** At any time after the filing of a complaint the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon request by the attorney for any party if the request includes:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

(3) Any limitations proposed to be placed on discovery;

(4) Any other proposed orders with respect to discovery; and

(5) A statement showing that the attorney making the request has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the request. Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the request shall be served on all parties. Objections or additions to matters set forth in the request shall be served not later than 10 days after service of the request.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of costs, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly requests a discovery

conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 9.3.

RULE 6.2 REQUEST FOR ADMISSIONS

(a) **Scope and Content:** A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 6.1(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after filing of the complaint and upon any other party with or after service of the summons and complaint upon that party. Each matter of which an admission is requested shall be separately set forth.

(b) **Response to Request for Admissions:**

(1) Each matter as to which an admission is requested shall be deemed admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him.

(2) The reasons for each objection made shall be stated. The answer shall specifically admit or deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission. If a party must qualify his answer or can admit only a part, he shall specify so much of it as is admitted to be true and shall qualify or deny the remainder. Lack of knowledge or information shall not be given as a reason to fail to admit or deny unless the answering party states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request. He may, subject to the provisions of Rule 6.5(d), deny the matter or set forth reasons why he cannot admit or deny it.

Reasons for refusal to concede the genuineness of documents and objections to the admission of documents in evidence shall be stated in

such terms as to enable the party making the request for admissions to understand the challenge and prepare to meet it if he can.

(c) **Order to Compel More Proper Answer:** The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Rule 6.5(a)(3) apply to the award of costs incurred in relation to the motion.

(d) **Effect of Admission and Relief From Admission:** Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

[Rule 6.2(e) deleted; content incorporated above.]

RULE 6.3 INTERROGATORIES TO PARTIES

(a) **Availability; Procedures for Use:** Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation of a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after filing of the complaint and upon any other party with or after service of the summons and complaint upon that party.

The interrogatories shall be so arranged that after each separate question there shall appear a blank space reasonably calculated to enable the answering party to have his answer typed in: *Provided*, That an answering party who elects to have each question retyped prior to having his answer typed in, shall be permitted to do so.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the

attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon the defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 6.5(a) with respect to any objection to or other failure to answer an interrogatory.

(b) **Scope; Use at Trial:** Interrogatories may relate to any matters which can be inquired into under Rule 6.1(b) and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

(c) **Option To Produce Business Records:** Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail as to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

RULE 6.4 PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

(a) **Scope:** Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 6.1 and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit

entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the merchandise or property or any designated object or operation thereon, within the scope of Rule 6.1.

(b) **Procedure:** The request may, without leave of court, be served upon the plaintiff after filing of the complaint and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 6.5 with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

RULE 6.5 FAILURE TO MAKE DISCOVERY: SANCTIONS

(a) **Motion for Order Compelling Discovery:** Upon reasonable notice to other parties and all persons affected thereby, a party may apply for an order compelling discovery as follows:

(1) *Motion:* (i) If a deponent or a party fails to answer a question propounded or submitted under Rules 6.3, 7.3, or 7.4, or a corporation or other entity fails to make a designation under Rule 7.3(b)(4) or 7.4(a), the party seeking discovery may apply for an order compelling an answer or a designation.

(ii) If a party, in response to a request for inspection submitted under Rule 6.4, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the party seeking discovery may apply for an order compelling an answer or an order compelling inspection in accordance with the request.

(iii) On matters relating to a deposition or oral examination, the

proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 6.1(c).

(2) *Evasive or Incomplete Answer:* For purposes of this paragraph (a), an evasive or incomplete answer is a failure to answer.

(3) *Award of Costs of Motion:* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay the moving party the reasonable costs incurred in obtaining the order, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of costs unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable costs incurred in opposing the motion, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of costs unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable costs incurred in relation to the motion among the parties and persons in a just manner.

(b) **Failure To Comply With Order:**

(1) If a deponent fails to be sworn or to answer a question after being directed to do so by the court, the failure may be considered a contempt of court.

(2) If a party or an officer, director, or managing agent of a party or a person designated under Rule 7.3(b)(4) or 7.4(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under paragraph (a) of this rule, or if a party fails to obey an order entered under Rule 6.1(f), the court may make such orders in regard to the failure as are just, and among others the following:

(i) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(iii) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action

or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable costs caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of costs unjust.

(c) **Failure of Party To Attend at Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection:** If a party or a person designated under Rule 7.3(b)(4) or 7.4(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 6.3, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 6.4, after proper service of the request, the court, on motion, may make such orders in regard to the failure as are just, including any action authorized under subdivisions (i), (ii), (iii), and (iv) of subparagraph (b)(2) of this rule.

The failure to act described in this paragraph may not be excused on the ground that the discovery sought is objectionable, unless the party failing to act has applied for a protective order, as provided by paragraph (c) of Rule 6.1.

(d) **Costs on Failure To Admit:** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 6.2, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable costs incurred in making that proof. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 6.2, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(e) **Failure to Participate in the Framing of a Discovery Plan:** If a party or his attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 6.1(f), the court may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable costs caused by the failure.

(f) **Costs Against the United States:** Except to the extent permitted

by statute, costs and fees may not be awarded against the United States under this rule.

Chapter 7. Depositions

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RULE 7.3 DEPOSITION UPON ORAL EXAMINATION

(a) **When Depositions May Be Taken:** After filing of the complaint, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subparagraph (b)(7) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 10.1. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) **Notice of Examination: General Requirements; Special Notice; Nonstenographic Recording; Production of Documents and Things; Deposition of Organization:**

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena *duces tecum* is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) The notice to a party deponent may be accompanied by a request made in compliance with Rule 6.4 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 6.4 shall apply to the request.

(3) The court may, for good cause shown, enlarge or shorten the time for taking the deposition.

(4) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a nonparty organiza-

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tion of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subparagraph (b)(4) does not preclude taking a deposition by any other procedure authorized in these rules.

(5) The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at his own expense. Any objections under paragraph (c) of this rule, any changes made by the witness, his signature identifying the deposition as his own or the statement of the officer that is required if the witness does not sign, as provided in paragraph (e) of this rule, and the certification of the officer required by paragraph (f) of this rule shall be set forth in writing to accompany a deposition recorded by nonstenographic means.

(6) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone. For the purposes of this rule and Rule 7.6, a deposition taken by telephone is taken at the place where the deponent is to answer questions propounded to him.

(7) Leave of court is not required for the taking of a deposition by the plaintiff if the notice (i) states that the person to be examined is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (ii) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true.

If a party shows that when he was served with notice under this subparagraph (b)(7) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(c) **Examination and Cross-Examination; Record of Examination; Oath; Objections:** Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of Rule 10.4. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subparagraph (b)(5)

of this rule. If requested by one of the parties, the testimony shall be transcribed.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and require him to transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) **Motion To Terminate or Limit Examination:** At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court may order the officer conducting the examination to cease from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 6.1(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 6.5(d) apply to the award of costs incurred in relation to the motion.

(e) **Submission to Witness; Changes; Signing:** When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and readings are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer, with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing, or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver, or of the illness or absence of the witness, or the fact of the refusal to sign, together with the reasons, if any, given therefor; and the deposition may then be used as fully as though signed, unless, on a motion to suppress under Rule 7.5(d) (4), the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) **Certification and Filing by Officer; Exhibits; Copies; Notice of Filing:**

(1) The officer shall certify on the deposition that the witness was

duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked: "Deposition of [here insert name of witness]" and shall promptly file it with the clerk of the court or send it by registered or certified mail to the clerk for filing and give prompt notice of its filing to the party taking the deposition.

Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them he may (i) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if he affords to all parties fair opportunity to verify the copies by comparison with the originals, or (ii) offer the originals to be marked for identification after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(g) **Failure To Attend or To Serve Subpoena; Costs:**

(1) If the party giving the notice of the taking of the deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable costs incurred by him and his attorney in attending.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable costs incurred by him and his attorney in attending.

RULE 7.4 DEPOSITIONS OF WITNESSES UPON WRITTEN QUESTIONS

(a) **Serving Questions; Notice:** After filing of the complaint, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 10.1. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 7.3(b)(4).

Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) **Officer To Take Responses and Prepare Record:** A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 7.3 (c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

(c) **Notice of Filing:** When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

RULE 7.5 USE OF DEPOSITIONS IN COURT PROCEEDINGS

(a) **Use of Depositions:** * * *

* * * * * * *

(2) The deposition of a party, or of anyone who at the time of taking the deposition was an officer, director, managing agent, or a person designated under Rule 7.3(b)(4) or 7.4(a) to testify on behalf of a public or private corporation, partnership, association or governmental agency which is a party, may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (i) that the witness is dead; (ii) that the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; (iii) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; (iv) that the party offering the deposition has been unable to procure the

attendance of the witness by subpoena; or (v) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

* * * * * * *

(b) **Objections to Admissibility:** Subject to the provisions of Rule 7.7 and subparagraph (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof, for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

* * * * * * *

(d) **Effect of Errors and Irregularities in Depositions:**

(1) *As to Notice:* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) *As to Disqualification of Officer:* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) *As to Taking of Deposition:* (i) Objections to the competency of a witness, or to the competency, relevancy, or materiality of testimony, are not waived by failure to make them during the taking of an oral deposition, unless the ground of the objection is one which might have been obviated, removed, or cured if presented at that time.

(ii) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived, unless seasonable objection thereto is made at the taking of the deposition.

(iii) Objections to the form of written interrogatories submitted under Rule 7.4 are waived, unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other interrogatories and within 10 days after service of the last interrogatories authorized.

(4) *As to Completion and Return of Deposition:* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 7.3 and 7.4, are waived, unless a motion to suppress the deposition or some part thereof

is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

* * * * * * *

RULE 8.2 SUMMARY JUDGMENT

(a) **For Claimant:** A party seeking to recover upon a claim, may, at any time after the expiration of the initial time within which to file an answer or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For Defending Party:** A party against whom a claim is asserted, may, at any time after the filing of a complaint, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon:** Oral argument of the motion may be requested pursuant to the provisions of Rule 11.1. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(d) **Case Not Fully Adjudicated on Motion:** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at an oral argument of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony; Defense Required:** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith, except that all papers and documents which are part of the official record of the action pursuant to Chapter 5 of these rules may be referred to in an affidavit without attaching copies, and shall be considered by the court without additional certification. The court may permit affidavits to be supplemented or opposed by depositions,

answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When Affidavits are Unavailable**: Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith:** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable costs which the filing of the affidavits caused him to incur, and any offending party or attorney may be adjudged guilty of contempt.

[Rule 8.2(h) deleted; language incorporated above.]

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RULE 14.3 ACCESS TO AND WITHDRAWAL OF PAPERS

(a) **Custody and Control:** * * *

* * * * * * *

(2) when requested by the Attorney in Charge, Field Office for Customs Litigation, Department of Justice, relevant papers may be transmitted by the clerk to an appropriate customs officer for the purpose of considering a submission upon agreed statement of facts pursuant to Rule 8.1, or for the purpose of answering an inquiry by an appropriate customs officer; or

* * * * * * *

(b) **Temporary Withdrawal:**

* * * * * * *

(2) The Attorney in Charge, Field Office for Customs Litigation, Department of Justice, may withdraw the relevant papers in an action to a designated place in his offices for a period not to exceed 30 days: *Provided*, That upon notice from the clerk, such papers shall immediately be returned to the office of the clerk.

(3) Any person, qualified in accordance with paragraph (b)(1) of this rule, may withdraw the relevant papers in an action to a designated place in the offices of the Customs Court or the Field

Office for Customs Litigation, Department of Justice: *Provided*, That such papers are returned to the office of the clerk no later than the close of business on the same day as they are withdrawn.

* * * * * * *

RULE 14.6 RESERVE FILE

(a) **Placement in Reserve File:** All actions commenced pursuant to 28 U.S.C. §1582 (a) and (b) (except actions commenced pursuant to section 516A of the Tariff Act of 1930), and commenced in the court after the effective date of these rules (including all appeals for reappraisement and all protests received by the court after the effective date of these rules), and all actions described in Rule 14.9(c)(1) shall be placed in the reserve file for the month and year in which the action is commenced.

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Chapter 18. Parties; Notice to Interested Parties; Intervention; Substitution

RULE 18.1 DOMESTIC INTERESTED PARTIES: PRACTICE

(a) **Party in Interest:** In an action filed pursuant to section 516(c) of the Tariff Act of 1930, a party in interest described in section 516(e) of that Act shall be deemed to be a defendant for the purposes of the application of these rules.

(b) **Trial, Participation:** A party in interest who does not file responsive pleadings as required by these rules shall not be permitted to engage in the active conduct of the litigation unless, on motion for good cause shown, the court orders otherwise. If the court permits such a party to participate, the pleadings filed by the defendant, the United States, shall also be considered the pleadings of such party in interest for all purposes.

RULE 18.2 NOTICE TO INTERESTED PARTIES

Notice to Interested Parties: The party filing an action under section 516A of the Tariff Act of 1930 shall forthwith notify by registered or certified mail all interested parties who were parties to the administrative proceeding of the filing of an action in this court.

RULE 18.3 INTERVENTION

(a) **Intervention of Right:** Upon timely application anyone shall be permitted to intervene in an action when a statute of the United States confers an unconditional right to intervene.

(b) **Procedure:** A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 4.1. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

RULE 18.4 SUBSTITUTION OF PARTIES

(a) **Death:**

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 4.1 and upon persons not parties in the manner provided in Rule 3.2(g) for the service of a summons. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) **Incompetency:** If a party becomes incompetent, the court upon motion served as provided in paragraph (a) of this rule may allow the action to be continued by or against his representative.

(c) **Transfer of Interest:** In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in paragraph (a) of this rule.

(d) **Public Officers; Death or Separation From Office:**

(1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

Chapter 19. Injunctions

RULE 19.1 INJUNCTIONS

(a) **Preliminary Injunction:**

(1) Notice: No preliminary injunction shall be issued without notice

to the adverse party. A party may not seek injunctive relief prior to the filing of a verified complaint.

(2) Consolidation of Hearing With Trial on Merits: Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial.

(b) **Temporary Restraining Order; Notice; Hearing; Duration:** A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) **Security:** No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages

as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

(d) **Form and Scope of Injunction of Restraining Order:** Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

APPENDIX A

FORM OF SUMMONS IN AN ACTION TO CONTEST DENIAL OF PROTEST

* * * * * * *

[No change in "Instructions for Use" or in summons form.]

APPENDIX B–1

FORM OF SUMMONS IN ACTIONS UNDER 19 U.S.C. § 1516(c)

* * * * * * *

[Only change is deletion of "By American Manufacturers, Producers, or Wholesalers" in caption; "Instructions for Use" and summons form will remain the same.]

APPENDIX B–2

FORM OF SUMMONS IN ALL OTHER ACTIONS

Instructions for Use

The summons consists of a single page (CC–SB2), setting forth identifying information concerning the determination contested in the action.

An original and 3 copies of the summons shall be filed, unless the action involves more than one defendant in which case an additional copy of the summons shall be filed for each additional defendant.

UNITED STATES CUSTOMS COURT

PLAINTIFF

v.

UNITED STATES,

DEFENDANT.

S U M M O N S

TO: The Attorney General, the Secretary of the Treasury, the International Trade Commission, or the Administering Authority:

PLEASE TAKE NOTICE that a civil action has been commenced to contest the determination described below.

_____

Clerk of the Court

1._____

(Name and standing of plaintiff)

2._____

(Brief description of contested determination)

3._____

(Date of determination)

4._____

(If applicable, date of publication in Federal Register of notice of contested determination)

5._____

(Name, signature, post office address, and telephone number of attorney filing summons or the individual filing summons in his own behalf)

(CC–SB2)

MISSING PAGES ARE INDEX PAGES
WHICH HAVE BEEN PHOTOGRAPHED
AT THE BEGINNING OF THE VOLUME(S)

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